TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 531

GENEVIEVE A. CLARK, PETITIONER,

vs.

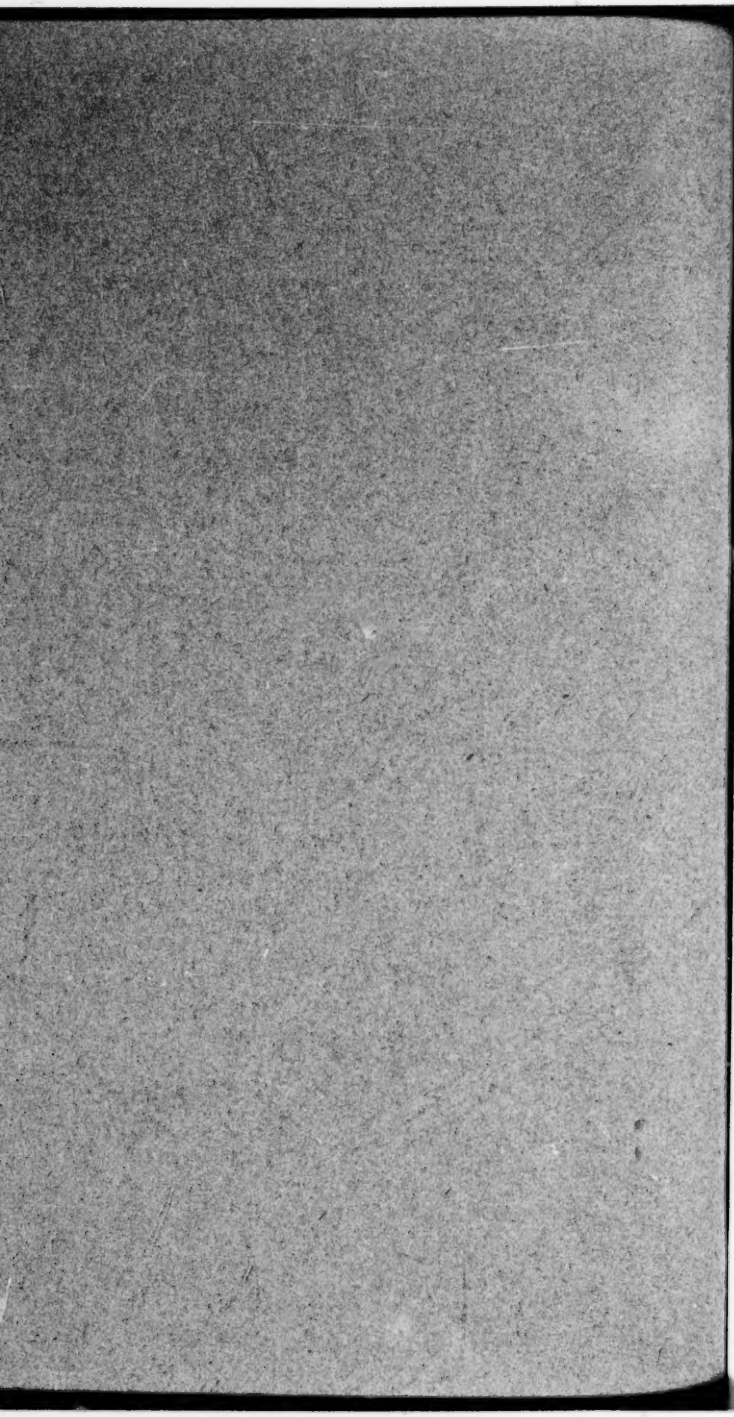
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1932

CERTIORARI GRANTED JANUARY 9, 1933

(37,228)



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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the October Term, 1932, of said Court, before the Honorable Kimbrough Stone, the Honorable William S. Kenyon and the Honorable Archibald K. Gardner, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the twenty-ninth day of February, A. D. 1932, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Genevieve A. Clark, was Appellant and the United States of America, was Appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1

United States District Court
District of Minnesota
Fourth Division

United States of America, Petitioner vs. Genevieve A. Clark, Respondent	No. 5448 Criminal (Contempt)

(Petition for Rule to Show Cause why Respondent should not be punished as for Criminal Contempt of Court.)

To the Honorable Judges of the District Court of the United States of America for the District of Minnesota:

The United States of America by Fred Horowitz, a special assistant to the attorney general of the United States, and Lewis L. Drill, the United States attorney for the District of Minnesota, represent to this Honorable Court as follows:

In the city of Minneapolis, state of Minnesota, in the District Court of the United States for the District of Minnesota, Fourth Division thereof, and at and during the March term, A. D. 1931, to-wit, on the 1st day of September, 1931, there came on to be tried, in this Honorable Court, before the Honorable Joseph W. Molyneaux, then and still a judge thereof, and a jury then to be there selected from the jurors then in attendance upon the said Court for the said term, and to be sworn for that purpose when so selected, a certain issue in due manner joined between the said United States of America and Wilbur B. Foshay, Henry H. Henley, Harry E. McGinty, Clarence W. Salisbury, Raymond Joel Andrus, Palmer V. Mabry and Herbert F. Welch (hereinafter sometimes called defendants for convenience), upon a certain criminal indict-
2 ment then pending in said court against the said defendants for having devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from divers persons (hereinafter sometimes called investors) who were desirous of investing or could be induced to invest their moneys in stocks and shares of corporations conducted in good faith; and that the said defendants in furtherance of said scheme and artifice and under the names of W. B. Foshay Co., a Delaware

corporation; W. B. Foshay Company, a Minnesota corporation; Public Utilities Consolidated Corporation, a Delaware corporation, and Public Utilities Consolidated Corporation, an Arizona corporation, made many false and fraudulent pretenses, representations and promises to said investors for the purpose of inducing such investors to invest their moneys in one or more of the aforesaid four corporations; and that the said defendants having devised the scheme and artifice as in said indictment alleged, and for the purpose and with the intent then and there on their part of executing said scheme and artifice, did unlawfully and feloniously knowingly place and cause to be placed in the postoffice of the United States at Minneapolis, Minnesota, to be sent and delivered by the postoffice establishment of the United States to the persons to whom each of the same was then and there directed seventeen certain letters, each letter being fully described in one of the seventeen counts of said indictment, and which indictment is docketed as number 5000 criminal, Fourth Division (and sometimes hereinafter referred to as the Foshay case for convenience); and that at and upon the selection of a jury in said Court from the said jurors for the trial of the said issue, to-wit, on the

3 1st day of September, 1931, within the city, division and district aforesaid, and within the jurisdiction of this Court, Genevieve A. Clark, late of the city of Minneapolis, hereinafter also referred to as respondent, was called to, and appeared with other jurors in the jury box of the said Court and was then and there duly sworn and took her oath as such juror before the said Court that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial; the said Court then and there having due and competent authority to administer the said oath to the said Genevieve A. Clark in that behalf; and the said Genevieve A. Clark so being sworn as aforesaid, it then and there, upon the selection of the jury for the trial of the said case from the said jurors, became and was a material inquiry:

(1) Whether the husband of the said Genevieve A. Clark, to-wit, one Daniel D. Clark was in the real estate business for himself, or whether he was connected with some firm;

(2) Whether the husband of the said Genevieve A. Clark, one Daniel D. Clark, was engaged in any other business prior to engaging in the real estate and insurance business;

(3) Whether she, the said Genevieve A. Clark, had ever been employed in any business, and if so, when;

(4) Whether she, the said Genevieve A. Clark, knew any of the defendants in the case;

(5) Whether she, the said Genevieve A. Clark, had her mind free and open and was not biased either for the prosecution or for the defendants, and would try to follow the evidence and would base her judgment on the evidence and the law as given to her, the said Genevieve A. Clark, by the Court;

That upon the selection of a jury from the said jurors for the trial of said issue as aforesaid, the said Genevieve
4 A. Clark wilfully and corruptly and contrary to her said oath did swear and depose in and before the said Court in answer to questions which were then and there put to her by the said Honorable Joseph W. Molyneaux, United States judge as aforesaid, who was then and there presiding at the trial of said criminal indictment against the said defendants, amongst other things in substance and to the effect following, that is to say:

(1) That her husband, Daniel D. Clark, is engaged in the real estate business by himself and that he is not connected with any firm;

(2) That for the past five years her husband, Daniel D. Clark, was engaged in the real estate business; that for two years before that date he was out of the city of Minneapolis, Minnesota, and was not doing anything, and before that was in the real estate and insurance business;

(3) That she, the said Genevieve A. Clark, had been in business, but that was before she was married, and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency;

(4) That she, the said Genevieve A. Clark, did not know any of the defendants in said Foshay case;

(5) That her mind was free and open; that she, the said Genevieve A. Clark, was not biased either one way or the other and would try to follow the evidence and would base her judgment on the evidence and the law as given to her by the Court.

Whereas, in truth and in fact it was not and is not true and at the time of so swearing and deposing the said Genevieve A. Clark did not believe it to be true that her husband, Daniel D. Clark is engaged in the real estate business by him-
5 self and that he is not connected with any other firm; but that it is true her said husband, as the said Genevieve A. Clark then and there well knew, was engaged in the real estate business with a firm known as Willie-Clark Co.;

And whereas, in truth and in fact it is not true and at the time of said swearing and deposing the said Genevieve A. Clark

did not believe it to be true that for the past five years her husband, Daniel D. Clark, was engaged in the real estate business; that for two years before that date he was out of the city of Minneapolis, Minnesota, and was not doing anything, and before that was in the real estate and insurance business; and that it is true, as the said Genevieve A. Clark then and there well knew, that her husband was, from 1915 to September 1, 1925, in the banking business and was president of the Citizens State Bank of St. Paul, at St. Paul, Minnesota, and as such president of the Citizens State Bank transacted business with the W. B. Foshay Company, a corporation, and with Wilbur B. Foshay, as president thereof, who was one of the defendants in said Foshay case; that the banking methods and policies of the said Daniel D. Clark were severely criticized by the Department of Commerce, Banking Division of the state of Minnesota, and that he was thereupon forced to and did resign as president and director and sever his connections with the said Citizens State Bank of St. Paul, all of which facts were well known to the said Genevieve A. Clark at the time she wilfully and corruptly and contrary to her said oath did swear and depose that for the past five years her husband was engaged in the real estate business; that for two years before that date he was out of the city of Minneapolis, Minnesota, and was not doing anything; and before that was in the real estate and insurance business;

6 And whereas, in truth and in fact it was not and is not true and at the time of so swearing and deposing the said Genevieve A. Clark did not believe it to be true that she, the said Genevieve A. Clark, had been in business but that was before she was married and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency, and that it was true that since her said marriage she was employed by the said Citizens State Bank of St. Paul, and other concerns, and as late as July, 1929, was employed by the said W. B. Foshay Company, a corporation;

And whereas, in truth and in fact it is not true and at the time of said swearing and deposing the said Genevieve A. Clark did not believe it to be true that she, the said Genevieve A. Clark, did not know any of the defendants in said Foshay case; and that it is true that she did know one or more of the defendants;

And whereas, in truth and in fact it is not true and at the time of said swearing and deposing the said Genevieve A. Clark did not believe it to be true that her mind was free and open; that she, the said Genevieve A. Clark, was not biased

either one way or the other and would try to follow the evidence and would base her judgment on the evidence and the law as given by the Court; and that it is true that her mind was not free and open and that she was biased and would not try to follow the evidence and base her judgment on the evidence and the law as given to her by the Court in that she was determined at the time she did so swear and depose that regardless of the evidence and the law that she would vote not guilty as to each and all of the defendants.

7 And the said Genevieve A. Clark, in the manner and form aforesaid, having taken an oath before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and contrary to her said oath, did depose and state material matters which she did not then believe to be true and did then and there commit wilful and corrupt perjury; and the due administration of justice, in the selection of a jury, and in the trial of said Foshay case in this Honorable Court was in fact thereby corruptly and unlawfully impeded and obstructed.

Wherefore, your petitioners pray that this Honorable Court enter an order requiring said Genevieve A. Clark, respondent, to appear in this Court in person at a day certain and show cause why she should not be held in contempt of this Honorable Court in consequence of her said contemptuous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt; and if, upon the hearing of this petition, it appears to the Court that any other person or persons were concerned in the matters hereinabove stated that they may be made parties respondent to this petition and required also to show cause.

FRED HOROWITZ,
Special Assistant to the Attorney General of the United States.

LEWIS L. DRILL
United States Attorney for the District of Minnesota.

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8 State of Minnesota,
County of Hennepin—ss.

Fred Horowitz, being first duly sworn on oath, deposes and says that he is a special assistant to the attornel general of the United States, and that he has read the foregoing petition by him subscribed and that he knows the contents thereof; and

that the matters and things therein stated are true to the best of his knowledge, information and belief.

FRED HOROWITZ

Subscribed and sworn to before me this 4th day of November, 1931.

FRED W. WEBBER

(Seal) Notary Public, Hennepin County, Minn.

My commission expires May 22, 1936.

Filed in the District Court on Nov 4, 1931.

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9 (Rule to Show Cause.)

Upon consideration of the petition this day filed herein by Fred Horowitz, a special assistant to the attorney general of the United States, and Lewis L. Drill, United States attorney for the District of Minnesota, and upon application in that behalf made, it is, by the Court, this 4th day of November, 1931,

Adjudged and ordered that Genevieve A. Clark appear in person and show cause, before this Court, if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, why she should not be adjudged in contempt of the authority of this Court as prayed in said petition; a certified copy of the petition and of this rule to be served upon the respondent named herein, on or before the 6th day of November, 1931.

GUNNAR H. NORDBYE
Judge.

(Marshal's return on service of writ attached.)

Filed in the District Court November 6, 1931.

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10 (Answer to Petition and Rule to Show Cause.)

Now comes Genevieve A. Clark pursuant to the rule of this Honorable Court, dated the 6th day of November, 1931, and shows cause why she should not be adjudged in contempt, and answers the allegations herein of the United States of America by Fred Horowitz, a special assistant to the attorney general of the United States and Lewis L. Drill, the United States attorney for the District of Minnesota, as follows:

1. Admits that she was called, appeared and was sworn,

on September 1, 1931, as a juror in the so-called Foshay case referred to in said petition, and admits the authority of this Court to administer the oath made by her as aforesaid.

2. Says if, upon such examination, it was a material inquiry whether she had ever been employed in any business, "and if so, when," that no inquiry was made of her as to when she was employed, as falsely insinuated in said petition.

3. Denies that upon the selection of a jury at said case she did wilfully, or corruptly or contrary to her said oath swear or depose to any matter, fact, or thing whatsoever.

4. Admits that upon her examination as aforesaid she answered that her husband was then in the real estate business by himself, and states that she believed such answer to be true, and states that she is informed and believes that her husband was not engaged in the real estate business with a
11 firm known as Willie and Clark until September 1, 1931, and states that she did not know of the existence of said firm until after the trial of said Foshay case.

5. Denies that upon her examination she stated "that for the past five years" her husband had been in the real estate business, as falsely set forth in said petition, and says that she stated her husband had been in the real estate business "for about five years" which was true, and admits that she stated that before that "we were out of the city for two years" which was true.

6. Says that she has read a court reporter's transcript of the questions of Judge Molyneaux and her answers upon said examination and that it appears in said transcript that she next answered as follows: "Before that, he was in the real estate and insurance business." Says in this connection that she is positive she used the word "banking" as well as the words "real estate" and "insurance." Says that she was very nervous at the time of said examination as it was her first experience as a juror, and said reporter several times stated, in substance and effect, that he had difficulty in hearing her answers and that she verily believes said reporter's notes are incomplete and incorrect in this and in other respects.

7. Says that it was true that her husband was in the real estate, insurance and banking business during the period indicated by her answer as aforesaid; that during such period her husband was an officer and director of Citizens State Bank of St. Paul and in connection therewith was active in the insurance and real estate departments of said bank.

8. Says if her husband as president of the Citizens State

Bank transacted business with the W. B. Foshay Co. or with Wilbur B. Foshay, it was wholly unknown to her until after the trial of said Foshay case.

9. Says that she is advised by her counsel that the statements in said petition disparaging the character and
12 business reputation of her husband are improperly inserted therein for the purpose of creating prejudice against her, and says she is further advised that she cannot lawfully be held in contempt of this Court for any such matters, even if true, and she therefore, without intending any disrespect to this Court, declines to answer such improper allegations.

10. Denies that on said examination she answered that she "had been in business, but that was before she was married" as falsely set forth in said petition, and says that the questions and answers on the subject of her employment were as follows:

"Q. Have you yourself ever been in any business of any kind?

A. I have been a stenographer before my marriage, yes.

Q. In what kind of business did you work?

A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency."

11. Says that the answers given as set forth in the next preceding paragraph were true.

12. Says she did not state and did not intend to state or infer that she had never been employed since her marriage, and says she was not asked by Judge Molyneaux to state all of her employments, and that if that was the import of his questions, she did not so understand them.

13. Says that after her marriage she was employed on a very few brief occasions, and that during the year 1929 she was employed for about two weeks at W. B. Foshay Company, and that to the best of her knowledge and belief she never met or saw any of the defendants in said Foshay case during said period or before or since then until September 1, 1931.

14. Says that because of the time that had elapsed since such employment at W. B. Foshay Co., the short duration of such employment, and her nervousness upon such examination, she did not recall such employment at the time of her examination, and that if she had then re-called the fact
13 that she had been so employed she would have volunteered such information to this Court; that she first re-

membered she had been so employed on the evening of September 1, 1931, and at that time considered conscientiously whether she should report the fact to Judge Molyneaux, but did not do so because of the time, nature and short duration of such employment, and because she did not know any of the defendants in said Foshay case, and because she was not biased either in favor of or against said defendants growing out of or on account of such employment.

15. Admits that on such examination she answered that she did not know any of the defendants in said Foshay case, and says that said answer was true.

16. Admits that on said examination she answered that her mind was free and open and that she was not biased either one way or the other and would try and follow the evidence and would base her judgment on the evidence and the law as given to her by the court; and says that she believed all of such answers to be true and that they were true.

17. Denies that any answer or answers made by her on such examination impeded or obstructed the due administration of justice, in the selection of the jury, or otherwise, in the trial of said Foshay case in this Honorable Court.

18. Says that she believes that said Fred Horowitz obtained the present rule to show cause in order to punish respondent because she refused to vote as a juror for a conviction of the defendants on trial in said Foshay case.

19. Says that she could not have voted otherwise than she did without violating her oath as a juror and the dictates of her conscience.

20. In addition to the matters hereinbefore set forth, respondent pleads not guilty.

SIGURD UELAND
Attorney for Respondent.

State of Minnesota,
14 County of Hennepin—ss.

Genevieve A. Clark, being first duly sworn on oath, deposes and says:

That she has read the foregoing petition subscribed by her and knows the contents thereof, and that the matters and things therein stated are true.

GENEVIEVE A. CLARK

Subscribed and sworn to before me this 7th day of November, 1931.

SIGURD UELAND
(Notarial Seal) Notary Public,
Hennepin County, Minnesota.

My commission expires July 12, 1936.

Filed in the District Court Nov 9, 1931.

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15 (Bill of Exceptions.)

Hearing before the Court, Honorables John B. Sanborn and Gunnar H. Nordbye, presiding, commencing on November 9, 1931, at 10 o'clock A. M., at the Federal Building, Minneapolis, Minnesota.

Appearances: Fred Horowitz, Esq., special assistant to the United States attorney general, appearing on behalf of the United States, and Sigurd Ueland, Esq., appearing on behalf of the respondent.

Judge Nordbye: You may proceed, Gentlemen.

Mr. Horowitz: May it please the Court, I believe at this time the defendant should enter a plea of guilty or not guilty to the petition.

Mr. Ueland: I will first enter my appearance for the respondent. I will file an answer, which I am going to read.

(Answer of the respondent read by Mr. Ueland.)

Mr. Ueland: Now, I suppose the question is about the time of hearing. This rule to show cause was served on my client last Wednesday; it was brought to me on Thursday. Due to a misunderstanding with the court reporter, Mr. Ackerman, I was unable to get a transcript of the questions and answers in this examination until Friday morning. Friday
16 morning and all Saturday I worked with Mrs. Clark and her husband in preparing this answer and I rested on Sunday.

Now, if the judges of this Court desire to examine Mrs. Clark at this time, she is perfectly ready and willing to take the stand and answer questions in connection with the transcript of the reporter, and has been ready at any time, and will answer anything concerning her conduct. But if this is to be a trial, where she is to be confronted or opposed by a dozen or two dozen witnesses, as I infer from the press—if she is to meet at this time everything that can be brought forward, as a result of weeks of investigation by—I don't know how many Government agents—then she is not ready to go to trial at this time, and I am not ready.

If there is to be such a trial, I shall want to bring to my assistance other counsel. I believe there are other members of the bar who have greater ability than I have in the conduct of the trial, and who will be willing to volunteer their services in this case, as I believe there is more involved here than the guilt or innocence of this woman.

However, in these contempt proceedings, as I understand the law, they are instituted in the first instance, we will say, by the special assistant to the attorney general of the United States. But, after all, it is the Court and the dignity of the Court which is primarily involved. And so, I suppose, in principle, and on the authorities—although I have had no opportunity and no time to make an extensive search—the Court can assume control of the proceedings and direct how they are to be conducted.

This is not the ordinary criminal case or civil case; it is not a game of wits between the assistant attorney general, or the assistant to the attorney general of the United States, and counsel for Mrs. Clark; it is an inquiry instituted to determine whether the dignity of this Court has been injured. And
17 my client has already suffered great irreparable injury through the publications that have been made in the press. We heard it first, or we read first of insinuations in the press that her name was on the jury list through some corrupt means. There is nothing of that kind in the petition. We heard next of insinuations in the press that she was visited by her husband, while a juror, for some corrupt purpose. There is nothing of that in the petition.

Then there have been innuendoes in the press—maybe that is too mild a term—that she is guilty of perjury. The press have even gone so far as to attack the reputation and character of members of her family—matters that have not the slightest connection with her guilt or innocence.

This woman, if innocent, is entitled to the respect and the admiration of all thinking people, especially members of the bar who understand the law, for voting as she did, if she voted in accordance with her convictions.

This Court, it seems to me, is under some sort of obligation to see that a juror who is presumed to be innocent, receives fair and honorable treatment.

If innocent, she has been persecuted to an extent never exceeded, I believe, by any similar persecution in this district.

Now, my suggestion would be that, if your Honors please, with the transcript of the court reporter as a basis—and the transcript of the court reporter which I have obtained shows that in many respects this petition on which this rule to show cause was issued, is false—my suggestion would be that this

Court, with the transcript, examine Mrs. Clark to the fullest extent now, and then determine whether the Court, which after all is primarily interested, wishes to go any further with this matter; whether the Court wishes to determine whether this woman has not suffered enough. Then, if there is to be
18 a trial, as I say, with all the witnesses that the agents of the Government can bring together, we must have at least thirty days in which to prepare.

Judge Nordbye: Well, it is our opinion, Mr. Ueland, that we should hear the evidence that Mr. Horowitz desires to present on behalf of this petition. Then, of course, if it appears that you should have further time for your defense, as to any matters that may be presented, the Court can hear you at that time. It does not seem to us that a continuance now is one that would avail the defendant very much, whether it is thirty days or a week.

Mr. Ueland: If your Honors please—

Judge Nordbye: May I finish, please?

Mr. Ueland: I beg your pardon.

Judge Nordbye: If we find that you should have further opportunity to meet any evidence presented by the Government in support of this petition, we would be very glad to hear you further on it, and pass upon that question at that time.

Mr. Ueland: May I make one additional statement? I will make another additional statement on that matter, if your Honors please. I obviously have had no time to investigate the character or the reputation of the witnesses who might be brought forward. I have had no time to investigate or brief the law on the admissibility of evidence that might be brought forward.

This is a case where I read in the press, that my client, according to a statement of the district attorney, can be sent to jail for ten years. It is just as important to her that I should be fully prepared, as it would be if this were an indictment for perjury. It is not in accordance with due process of law, in my opinion, that a person should be compelled to go to trial with but two days of preparation, in a matter where her reputation, and her liberty, are at stake.

If the Court goes on and hears the testimony of the Government witnesses at this time, I would respectfully have to
19 ask for an exception.

Judge Nordbye: An exception will be allowed.

Government's Exhibit 1, the indictment Number 5000, filed in the United States District Court, entitled, "United States of America vs. W. B. Foshay, et al.," which was filed on February 18, 1931, offered and received in evidence.

Mr. Horowitz: I understand there is no question raised

here that the respondent, Genevieve A. Clark, was on the jury panel and was sworn to make true answers to such questions as might be put to her by the Court, touching upon her qualifications and competency to act as a juror?

Mr. Ueland: We have admitted that she was put on in the manner alleged.

Mr. Horowitz: Yes, and that she likewise was a member of the jury as finally selected to try the case of the United States of America vs. W. B. Foshay and others in the criminal case Number 5000?

Mr. Ueland: Yes.

Mr. Horowitz: And that the trial of that case started September 1, 1931, and the jury was discharged on October 23, 1931?

Mr. Ueland: That is admitted.

IRENE M. PASSER, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I live at Olivia, Minnesota. I was one of the persons called as a prospective juror in the case of the United States vs. W. B. Foshay. I was in this court room on September 1, 1931. During the time that I was in court I had occasion to speak with the respondent, Mrs. Genevieve A. Clark. We talked with each other. It was just at—nearing the close, at the noon recess—just before the afternoon session was over—that we became acquainted, and I talked with her for some time after that, while court was in session. We sat together in the last row of seats in this court room. During that time Mrs. Clark made a statement to me concerning her previous occupation.

Mrs. Clark told me that she had worked in the Foshay Building, but that she was sure that would not disqualify her for jury service. Mrs. Clark said that she was simply praying to serve as a juror in that particular case. I asked her why she would want to serve on a case that would last so long, and she said that she had a very special reason, but she did not state it. No, she did not state the reason. I told Mrs. Clark that I was very much surprised that we were summoned as jurors in the Foshay case, because I had not known of it until I arrived in court, and she told me that she knew two weeks before that she was called on the Foshay jury panel.

Cross Examination.

By Mr. Ueland:

Mrs. Clark was called shortly after our conversation, and she was examined perhaps an hour before I. I was sitting in

the back row of jury seats. I sat between Mrs. Johnson of Moorhead and Mrs. Clark. Mrs. Carl Johnson, another member of the jury panel, sat at my right, and Mrs. Clark sat at my left. In the conversation that I had with Mrs. Clark, Mrs. Johnson took very little part; she took some part in it. We talked about Olivia and Redwood Falls—very little other things—mostly court procedure. Mostly relative to court procedure—of the case; we listened to the jurors being questioned; we spoke of the fact that the jurors were being questioned. We did not talk about the case.

Q. I thought you just said that you did talk about the case; you talked with Mrs. Clark about the case, didn't you?

A. I said, we talked relative to court procedure in re-
21 gard to the jurors being questioned.

Q. You talked about the Foshay case with Mrs. Clark, didn't you?

A. No, I did not.

Q. Did you talk about the Foshay case with Mrs. Clark—yes or no?

A. Well, I don't know whether you mean that the talk that we had would refer to it indirectly or not; we certainly did not discuss the Foshay case. When Mrs. Clark told me that she was simply praying to serve in this case, I told her that I would not be able to serve, even if my name were drawn and I were called, due to illness, and I remember Mrs. Johnson speaking of her own illness at that time.

When Mrs. Clark was examined I should judge it was about the middle of the afternoon, but I did not look at the clock. I was examined about 4:30. I heard Mrs. Clark's examination.

Q. How long did her examination take?

A. I did not time it. Well, it did not take very long. My examination did not take very long. While I was in the court room I talked to Mr. Moore of Bemidji and Mr. Mitchell of Rochester, and Mrs. Anderson of Mankato. My conversation with Mrs. Clark was a very intermittent conversation, because court was in session, and I judge we sat there an hour together, and were talking part of the time. Mrs. Clark told me that she had known that she was going to be called on the panel for the Foshay case for two weeks.

Q. (By Mr. Ueland.) You are sure about the two weeks part of it?

A. Absolutely.

Q. You are as sure about the two weeks as you are about the rest of your testimony here?

Mr. Horowitz: We object to that as being argumentative.

Judge Nordbye: The objection is sustained.

I first talked to Mr. Horowitz about this case last Satur-

day morning. The day after the jury was chosen in the Foshay case, I lunched with a friend before leaving the city, and I told her about this case. That friend is a newspaper
22 woman, Bess Wilson. She is connected with the Minneapolis Journal. I next talked with anybody about this matter about the 28th of October. On that occasion I was interviewed by Mr. Hugdal. I don't know his official title; he is somebody representing the Government. He came to see me.

Q. In the meantime, you had been reading about this case in the papers, had you not? A. I read it all.

I read the Minneapolis Journal, and the Minneapolis Tribune and the Minneapolis Star. I read all about this case in all three papers. I have acquaintances in Redwood Falls. I never discussed them with Mrs. Clark. In my conversation with Mrs. Clark I think I remarked upon the appearance of Mr. Maslon, one of the attorneys in the Foshay case. Mrs. Wilson was from Redwood Falls some years ago.

I asked Mrs. Clark if she knew Mrs. Wilson. Mrs. Wilson had lived in Minneapolis for years. She was not mentioned in connection with Redwood Falls. I asked her if she knew Mrs. Wilson, and she said they drove through—Mrs. Clark told me that they motored to Redwood Falls frequently, because her husband's people live there, and that they motored through Olivia. That was just about all that we talked about Redwood Falls. I don't recall that I discussed with her that we had some acquaintances in Redwood Falls. I have never been on a jury. I have never been a witness before.

This conversation that I had with Mrs. Clark naturally made an impression on my mind at the time. I did not say something about it to one of the Government attorneys because I thought it was within their province to select the jurors. I was not sitting in judgment on Mrs. Clark.

Q. (By Mr. Ueland.) And if I understand you correctly, you are very positive that Mrs. Clark said she had known that she was going to be on the Foshay case for two weeks?
A. Well, I asked her how she could possibly have
23 known it, because there was no clue to that effect in the summons, and no one had seen fit to inform me that it was the Foshay case; so I asked her how she could possibly have known, and she said her cousin, who worked in a building in St. Paul, had told her.

Q. And she knew it for at least two weeks?

A. Two weeks, is what she said.

Q. And she was told by her cousin, who works in a building in St. Paul? A. That is what she told me.

Re-Direct Examination.

By Mr. Horowitz:

I could not swear that she said what building, but I think she said the Federal Building. No, I did not ask her the name of this relative; she said, her cousin. No, I did not sit in the back row during the entire day of September 1st. I only joined Mrs. Clark when the afternoon session began. I did not speak to Mrs. Clark in the morning; I sat in a chair on the other side of the room.

HUGO J. ACKERMAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

I am a court reporter. I have been reporting cases in the Federal Court for about 20 years, in Milwaukee and Minnesota —in Minneapolis. I have acted as court reporter in many cases during that twenty years. I was employed to act as court reporter in connection with the so-called Foshay case. I took down the questions and answers that were propounded to the jurors, by Judge Molyneaux. I have notes with me of the testimony of Mrs. Clark. This three page document is some of my work. That is a transcript of my notes of the testimony of Genevieve A. Clark of Minneapolis, Hen-
24 nepin County, Minnesota, called and sworn as a juror in the Foshay case on September 1st, 1931. I compared the questions and answers as set forth on these three pages with my original notes. This is a true and correct transcript of my notes.

(Government's Exhibit 2 marked for identification by the reporter.)

Mr. Horowitz: We offer this in evidence as Government's Exhibit 2.

Exhibit 2 is as follows:

"September 1st, 1931.

Genevieve A. Clark,

of Minneapolis, Hennepin County, Minnesota, called and sworn as a juror, testified as follows:

Examined as to qualifications by the Court:

Q. Genevieve A. Clark, you live at Minneapolis, Minnesota?

A. Yes, sir.

Q. Are you married? A. Yes, sir.

Q. Have you any children? A. I have two.

Q. What is your husband's business?

A. In the real estate business.

Q. In what way is he in the real estate business, is he with some firm, or is he by himself? A. He is by himself.

Q. Does he deal in city property? A. Yes, sir.

Q. Is he selling property on commission—making a commission? A. Yes, sir.

Q. Does he have an office? A. Yes, sir.

Q. Where? A. 417 South Fourth Street.

Q. How long has he been in the real estate business?

A. For about five years.

Q. Was he in some business before that?

A. Well, we were out of the city for two years, when he was not doing anything. Before that, he was in the real estate and insurance business.

Q. Have you yourself ever been in any business of any kind?

A. I have been a stenographer before my marriage, yes.

Q. In what kind of business did you work?

A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency.

Q. Have you ever read about this case—concerning this case? A. Yes, sir, I have read some of it.

Q. In what papers? A. The Minneapolis Journal.

Q. Have you read about it lately?

A. I have not read it lately—until just the last day or two.

Q. Did you talk with people, including your husband, concerning it?

A. Yes, sir—pardon me—only with my husband. I have not discussed it with others.

Q. Only with your husband? A. Yes, sir.

Q. Was that sometime ago, or just lately? A. Just lately.

Q. Did you discuss it sometime ago at all with your husband? A. I don't remember whether I did or not.

Q. Well, did he express an opinion to you concerning it—the guilt or innocence of these defendants?

A. No, he never has.

Q. Well, have you expressed an opinion to him?

A. No, I feel I have no opinion at all.

Q. You have formed no opinion? A. No opinion.

Q. Do you know any of the lawyers in this case?

A. No, I do not.

Q. Or any of the defendants? A. No, I do not.

Q. Have you ever bought or sold any stock in a corporation? A. No, sir.

Q. Or any bonds? A. No, sir.

Q. What schooling have you had?

A. High school and business college.

Q. You took bookkeeping there?
A. No, I did not take bookkeeping.
Q. You did not take bookkeeping? A. No.
Q. Have you ever had any experience at all in bookkeeping?

A. I have never been an actual bookkeeper, but I have had a little bookkeeping experience when I was doing the insurance work. I was not a bookkeeper at the time, but I had access to the books, and occasionally made entries, but that is all.

Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other? A. Yes, I do feel that way.
Q. Did you ever sit on a jury before? A. No, sir.

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court? A. Yes, I do.

The Court: Any questions?
Mr. Horowitz: No questions.
Mr. Brill: No questions."
26 Mr. Ueland: We have no objection to the transcript but I think the notes should go in also as a part of the same exhibit.

(Government's Exhibit 3 marked for identification by the reporter.)

Exhibit 3 is the original reporter's notes upon which Exhibit 2 is based.

Direct Examination.
(Continued.)

By Mr. Horowitz:

Q. I will ask you, Mr. Ackerman, to state if you were present at the taking of a statement of the respondent, Genevieve A. Clark, and her husband, Daniel D. Clark, on November 3, 1931, at their home? A. I was.

Q. And at that time did you make notes of everything that transpired at the home? A. Yes, sir.
Q. And everything that was said by each person? A. I did.
Q. And did you subsequently make a transcription?
A. I did.

(Government's Exhibit 4 marked for identification by the reporter.)

Q. I call your attention to Government's Exhibit 4 and ask you to state whether that is a true and correct transcript of every word that was uttered from the time you appeared until the time that you left? A. It is.

Q. Can you tell us at this time who were present at that meeting?

A. There were present Mr. Horowitz, Mr. Schriver, Mr. Simmons, Mr. Ralph Hugdal, and Mr. and Mrs. Clark and myself.

MRS. BESSIE W. JOHNSON, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside at Moorhead, Minnesota. I was called on the jury panel in the Foshay case, as one of the prospective
27 jurors. I was here in the court room on September 1, 1931. During the course of that day I had occasion to talk with Mrs. Passer, the witness who has just left the witness stand, or who left the witness stand a few minutes ago. I likewise had occasion to talk with the respondent, Mrs. Genevieve A Clark.

Q. And during the time that you talked with Mrs. Clark, did she make any mention of the fact of her prior employment? The question is, did you have such a conversation? You can answer that yes or no.

A. Yes. She made some mention of what her work had been before she was married, for the reason that I asked her when the jury was being questioned; I said to her, "Do you know anything of bookkeeping?" and she said, "But a very little," and she said she had been a stenographer, and she also told me that she had done stenographic work for about two weeks for the Foshay Company, since she was married, or after she was married. I think there was no further conversation about her having been employed by that company. She only wondered if it would disqualify her. She wondered if that would disqualify her as a juror. I could make no response, for it was my first appearance in a court room, and I would not really know. Well, I cannot recall any other matters discussed with Mrs. Clark of any great importance. We talked just back and forth a little; I cannot recall anything of any great importance; only that I understood that she—

Mr. Ueland (interrupting): Just a moment. I object to the witness stating what she understood.

Judge Nordbye: The objection is sustained.

Q. (By Mr. Horowitz.) Say what she said, as nearly as you can remember. You don't have to state what you understood.

A. I cannot remember specific words, only that we were sitting together, and being together, that we would naturally

converse, but I understood that she was anxious to serve on the jury.

28 Mr. Ueland: I move that that be stricken out.

Judge Nordbye: It may be stricken.

Q. (By Mr. Horowitz.) Well, now, what did she say about wanting to serve on the jury, if anything?

A. Well, I would not want to testify to something that I could not be positive of.

Q. That is, you don't have to say the exact words, Mrs. Johnson, but the substance of them, if you can remember the substance of them?

A. I cannot do that, even.

Cross Examination.

By Mr. Ueland:

We were sitting in the back seat, right over there (indicating), I think both morning and evening—I cannot say for a certainty, in the afternoon—in the morning, I am not so certain—I think we sat—I would not say in the last seat, but I know we sat back in the court room; in the afternoon we sat in the last seat. I had never met Mrs. Passer until that day. I talked to her some at that time. With reference to me and Mrs. Clark, well, as I remember it, she was sitting between the two of us in the afternoon. In the morning, I think Mrs. Passer sat alone; that is, as far as women were concerned, she sat right alone, right about just about where my finger is pointing to the back (indicating). From where I sat, she sat on the left side of the room; that was in the morning. Mrs. Clark and Mrs. Anderson and I sat somewheres near where we sat in the morning; I would not say just what seats. In the morning, Mrs. Clark and I were sitting over on this side, in the morning, too. In the morning Mrs. Clark and I were not sitting by Mrs. Passer. I could not remember what else I talked to Mrs. Clark about; I was interested in the court proceedings. I remember distinctly that she said she had worked for the Foshay Company, and wondered if it would disqualify her. She said that she worked for the Foshay Company after her marriage; not just after her marriage, but after her marriage; I would not say, just after. After her marriage, she had done two weeks' work for the Foshay

29 Company. Yes, I am sure about the two weeks. Well, I occasionally read the daily papers from the Twin Cities, and I read our daily papers, our local papers, two of them, the Fargo Forum, and the Moorhead News. I have not followed this case up.

Q. I asked you if you read the Minneapolis papers at all about this case? A. A very little.

Q. But you have read the Minneapolis papers about this case? A. Yes.

I first talked to Mr. Horowitz about the case when Mr. Horowitz called me by long distance telephone Saturday afternoon, to come down to him. When I went home, or where I was staying, with my brother, when I went home that evening, of course, I talked about the proceedings, what had taken place.

Q. When did you first talk to anybody about your conversation with Mrs. Clark?

A. Well, I don't know if I mentioned it—I would not say that I mentioned it at that evening, but while I was down there, I stayed at my brother's for a few days, and I know I mentioned to them the fact of her having worked for the company, and wondering if she would disqualify, but I could not say if it was that evening, or the next day; I cannot testify to that.

I was not examined as a juror; my name was not drawn. I heard Mrs. Clark examined. I did not talk to her after that; she remained here. I only talked to her before. That is all the conversation I can remember. I will also say that she did say, and I said that we knew—she knew very little about the Foshay case. I said that I had not followed it; we talked about that, but we did not discuss the case, but as prospective jurors I said that I had not followed the case, and she said she had not either.

Q. Was anything said about the subject of when she knew she was going to be called? A. Not that I heard.

When I came down here, and my brother met me, he asked me if I knew what I was down here for, and I said I did not; he says, "You are called on the jury—you are called on the Foshay case."

ANDREW FARBER, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I live at Walnut Grove, Redwood County, Minnesota. I was one of the jurors in the Foshay case. I got acquainted with Mrs. Clark, the only woman juror in that case. During the time that we were on the panel together I had occasion to talk with her, or she did with me. It was during the first week of the trial. The conversation took place out in the corridor, during the recess. I mean outside of the court room, standing by the railing, yes. Mr. Peterson and myself and Mrs. Clark were present.

Q. And what did she say at that time?

Mr. Ueland: Just a moment. That is objected to as being

privileged, incompetent, irrelevant and immaterial.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

A. I don't know just what led to the conversation, or what we were talking about; we were merely getting acquainted then; it was the first conversation I had had with Mrs. Clark. She said that she believed that Mr. Foshay was a victim of circumstances, that he had went east to arrange for an eighteen million dollar loan, or had it arranged for, and the crash came, and he came back, however, without a dollar.

Q. Up to the time, Mr. Farber, had there been any testimony—

Mr. Ueland (interrupting): I object to this entire line of questioning, and I reserve an exception to each.

Judge Nordbye: It may be so understood.

Q. (By Mr. Horowitz.) And up to that time, Mr. Farber, had there been any testimony by any witness, or by any written evidence, that in any way discussed or mentioned Mr.
31 Foshay going east for an eighteen million dollar loan, or a loan of any size?

A. None that I remember. I asked her if she had this information before she was sworn as a juror in this case, and she said that she had read it in the papers, but had not recalled it until after she had been sworn.

I heard her speak of the different attorneys. She seemed to be better acquainted with them than we were, and was pointing out different ones of the attorneys, who they were, but I could not—it was sometime during the eight weeks of the trial. This was before Judge Molyneaux gave his instructions to us. I believe other members of the jury heard the conversation with respect to the various attorneys. I think that Mr. Elmquist and Mr. Peterson would hear this particular conversation. It was at the table, at the Andrews Hotel on Washington that she talked to me about the attorneys. She talked about Mr. Horowitz and Mr. Maslon and Mr. Brill.

Q. What did she say about Mr. Brill and Mr. Maslon, if anything?

Mr. Ueland: That is objected to as irrelevant and immaterial, having no bearing whatsoever on the charges in this petition, on the order to show cause.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

A. She said that Mr. Maslon was a graduate of Harvard University, and was a very bright attorney, as also was Mr. Brill. I do not recall that she told me at that time where she got the information that Mr. Maslon was a graduate of Harvard.

During the time that this case was in progress, we jurors were stopping at a local hotel, at the Andrews Hotel. We had our meals on the main floor most of the time, in the private dining room, and part of the time we were on the second floor. Before the case was finally submitted, I don't recollect that Mrs. Clark made any statement about the Government
32 and the transactions of the United States by the Government.

Mr. Horowitz: The rest of the examination with respect to this jury relates to conversations that took place within the jury room, and during the time of their deliberations, and if there is any question as to the propriety of that, I will not go into that, but I understood that there was no privilege with respect to petit juries, that that was a privilege that extended exclusively to Grand Jurors, and I want to say that the purpose of it is that the respondent in this case—

The purpose of that examination is to show that after the first few minutes that the jury was out, that the respondent refused to discuss and consider the case, and to show that she had her mind made up as to the outcome of the case long before she ever got into the jury room.

Mr. Ueland: Which would be irrelevant and immaterial as to the charges made.

Mr. Ueland: Well, as I say, I have not had any opportunity to brief the law on this point. Wigmore on Evidence, Section 2346, says: "The requirements of the general principle of privileged communications are fully satisfied for communications between jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to the due attainment of the jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and the most careful protection; and the injury from disclosure would certainly overbalance the benefits thereby gained. It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow juror disclosed upon the witness stand against his consent."

Now, the reason for that rule ought to be particularly apparent in this case, that in cases like this, a disagreement among jurors, of course, results in bad feeling. If the minority jurors can be held for perjury, perjury, mind you, on the testimony of his co-jurors, that attempt being made here,
33 then, you might as well abolish the jury trials and abolish the requirement of a unanimous vote in order to convict or acquit.

Mr. Horowitz: Of course, the situation is that very frequently the proceedings of a petit jury are gone into in determining, for example, whether or not the jury arrived at a ver-

dict by lot, or whether they gambled as to the outcome, and arrived at a verdict in that way, and many of the probabilities that do exist, cease to exist in matters of perjury, and it would just be impossible to show any state of mind of a person, except by showing their acts and conduct subsequent.

Judge Nordbye: Well, we will receive the testimony subject to the objection, and if we determine, upon further consideration, that the testimony is not admissible, we will disregard it, and will not consider it in our determination of this matter.

Mr. Ueland: May I have an exception?

Judge Nordbye: Yes.

We started deliberations in this case, I think that it was about three o'clock; I don't exactly remember the date, it was on Friday. We were out for about a week thereafter. It would be the Friday before we were discharged as jurors.

Q. And how long was it after you got into the jury room, before you started to ballot?

A. Well, the records were not all in, and we were being disturbed by the records coming up, and I don't just remember, but it was about the first thing that we done, was to ballot on the question as to whether there was a scheme to defraud.

After that Mrs. Clark said that she considered Mr. Horowitz a very brilliant attorney, and as long as he could not convince her, there was no chance of us eleven men—there was no chance of you eleven men to convince me. We deliberated that day, I believe, until five o'clock.

During the course of the deliberations, I called her attention to the so-called eighteen million dollar loan arrange-
34 ment after an argument. I asked her if she—if the Court should call me in to give a reason—if I knew of any reason why we had not been able to agree—I asked her if she wanted me to tell him that she believed that Mr. Foshay was a victim of circumstances. That she believed that Mr. Foshay was a victim of circumstances, and also in regard to this eighteen million dollar loan, and she says, "No, I hope you will have more sense than that." She said that her closest relation or acquaintance with any of the defendants was that she knew a Mrs. O'Hearn in St. Paul, for seven years, and after the trial started she learned that Mrs. O'Hearn was a sister of Mrs. Mabry. She said she learned that after the trial started from Mrs. Henderson, the bailiff.

Mr. Ueland: Is it understood that all of this examination is subject to my exception?

Judge Nordbye: Yes.

Well, she said—it was about on the fifth day of our deliberations—she said, "I wish I could talk to my husband, to get

his opinion about it, and find out whether I am absolutely wrong or not."

Mr. Coble was one of the witnesses for the government in the Foshay case, an accountant. Well, we were regarding the charts of Mr. Coble, and she says, "Yes, Coble, I would like to choke him" She said that he, on some trial in the south, on his testimony, had very nearly convicted a man but the jury had found him innocent, and that his wife's hair had turned gray, and she later died; that his son contracted t. b. and was dying, and when his son died, he was going to kill Coble.

Mr. Ueland: May I add to my objection, as to this line of testimony, that it is irrelevant and immaterial.

Judge Nordbye: Yes. The objection is overruled.

Mr. Ueland: Exception.

She said she read this information about Mr. Coble, and about this proposed killing, and all that sort of stuff in the papers.

35 We jurors were out only one Sunday. We deliberated until three o'clock in the afternoon. Mrs. Clark said that she was not feeling well, and she would not stay any longer than three o'clock. She said that immediately after we entered the jury room, after lunch, about one-thirty.

Mr. Ueland: I also object to this line of questioning as irrelevant and immaterial.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

Q. (By Mr. Horowitz.) And during the entire time, that the jury was out, were you able to discuss the various parts of the evidence with Mrs. Clark? A. Very little.

Q. Well, just tell us what she did, and what she said, and how she acted in the jury room.

Mr. Ueland: That is objected to as irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Ueland: Exception.

A. Well, at different times arguments would start, and Mrs. Clark did not seem to be interested—was not listening. Sometimes she held her hands up over her ears, and it was hard to argue with anyone that won't reply. She said that she could not send these seven men to the penitentiary because it would bother her the rest of her life, if she lived to be a hundred years old. She said that it was getting pretty dry there; she thought she would bring a book, one afternoon, and I told her there were plenty books there.

Mr. Ueland: No cross examination.

PETER A. PETERSON, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I live at Revere, Minnesota. My business or occupation
36 is that of grain buyer. I have lived in Minnesota all my
life. I was one of the jurors in the so-called Foshay case. I became acquainted with the woman juror, Mrs. Genevieve A. Clark.

Q. Mr. Peterson, during the first week of the trial, did you have any conversation with Mrs. Clark? A. Yes, sir.

Mr. Ueland: Just a moment. I object to that, as being privileged, irrelevant and immaterial, and incompetent.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

Mr. Ueland: And may my exception stand to all of the conversation?

Judge Nordbye: It may be so understood.

Mr. Ueland: The objection and exception?

Judge Nordbye: Yes.

I think that conversation was out here in the corridor, out here in the building. Well, I think she was talking to Mr. Farber and me at the same time, at that time. Well, she was talking about Mr. Foshay, that he was a victim of circumstances, and I believe she said that he had gone East some place to arrange for a loan of eighteen million dollars, and the crash came and he came back without any money.

No, I don't recall whether she said how she got the information that he had gone East to obtain eighteen million dollars. I did not make any reply to the statement that she made. I did not say anything. During the time that the jury was out, and at the dinner table, at the Andrews Hotel, I sat near Mrs. Clark.

Mr. Ueland: Was this after they retired?

Mr. Horowitz: No, this was before.

Q. And during these various dinners and other meals, did Mrs. Clark ever make any statement concerning the Government? A. Well, yes, she did.

Well, she did not just approve of all that the Government
did, or something of that kind. We were talking about
37 the attorneys in the case, and she said that they had
not used the Government soldiers right. The Government had not used the soldiers right. That came up in a discussion about the attorneys in this case. Well, I think that is where it started. We started to talk about Mr. Maslon and Mr. Horowitz and Mr. Brill; and that is what was said. I cannot remember that she said from what source she got

any information about the attorneys. After the jury went out to deliberate in this case, she made a further statement about this belief that Mr. Foshay was a victim of circumstances.

Mr. Ueland (interrupting): Just a minute. That is objected to as being privileged, and irrelevant, incompetent and immaterial.

Judge Nordbye: We will make the same ruling as we have heretofore done.

Yes; she mentioned—I believed she mentioned a couple of times in the jury room about what I have just stated, about the loan.

Q. Well, did any one of the jurors ask her from what source she got that information?

A. Why, yes. I believe Mr. Farber asked her about that, if I am not mistaken. Why, I cannot remember what she replied to that; it is not clear—I cannot remember.

I remember a conversation by her as to Mr. Coble.

Q. Just state the conversation in that respect.

Mr. Ueland: I understand that my objection applies to this examination, and my exception?

Judge Nordbye: Yes.

A. Well, I cannot say just exactly the conversation, the way it ran, but I happen to remember this one statement that she said she would like to choke him; I remember that. I don't recall whether she said anything about the relationship between her husband's secretary and the man who was prosecuted down South.

38 Q. I want you to explain, in your own language, Mr. Peterson, the way in which Mrs. Clark acted, and the discussions, or lack of discussion that went on in the jury room, during the time that you were deliberating this case?

Mr. Ueland: The same objection as the last made, and exception.

Judge Nordbye: The objection is overruled, and exception allowed.

A. Well, that would be a long discussion; I cannot remember all that, but I know that her attitude was very much one-sided all the way, so there was not very much discussion, you might say. No; she didn't like to—she did not say very much.

Q. Was there any effort made on the part of the other jurors to get her to state why she believed as she did?

A. Oh, yes, there was lots of that. There was lots of that done, but I cannot just recollect how it came about.

Q. And what would she reply when they would ask her about these matters, or try to engage her in conversation about these matters?

A. Well, I don't know—she did not say—I don't know as

I can say it exactly, what she did say at times; I don't remember it fully—well.

Mr. Ueland: No cross examination.

GEORGE A. DAHL, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside at Winnebago, Minnesota. I have lived in Minnesota about fourteen years. I was one of the jurors in the so-called Foshay case. I am acquainted with Genevieve A. Clark, one of the jurors in that case.

After I was in the jury room I heard some discussions by Mrs. Clark. I recall a conversation relating to the so-
39 called arrangement for a loan of a large size, a large amount.

Q. I want you to state, Mr. Dahl, what Mrs. Clark said about that matter.

Mr. Ueland: That is objected to as calling for a violation of the privilege of the respondent, and incompetent, irrelevant and immaterial.

Judge Nordbye: It may be received.

Mr. Ueland: Exception.

Judge Nordbye (continuing): —with the same reservations that we have heretofore made.

A. Well, she made the remark that she thought that Mr. Foshay was a victim of circumstances, that he had went East to make arrangements for an eighteen million dollar loan—eighteen or nineteen million—I don't remember which, and when that depression came, the crash, why, he came back without any loan. I heard all of the testimony in this case, in the Foshay case. I did not hear anybody testify that Mr. Foshay had gone East to make arrangements for or had made arrangements for a large sized loan.

Q. (By Mr. Horowitz.) Well, did any of the jurors, Mr. Dahl, ask Mrs. Clark where she got that information?

A. Well, I think it was asked. I think she said she got it in the newspapers.

I heard the remark that she made about Mr. Coble.

Mr. Ueland: Is my objection still in force?

Judge Nordbye: Yes, and exception allowed.

Well, she made the remark that she would like to choke him, or wring his neck, or something like that. I don't recall that she did say why.

I think there was discussion in the jury room about the fact that she would like to talk to her husband. Well, she said she would like to have his opinion—how he would vote. I could

not say whether anybody made a reply to that statement of hers.

40 Q. (By Mr. Horowitz.) Do you know, Mr. Dahl, whether Mrs. Clark did see her husband since the first day of September, and up to the time of your deliberations?

Mr. Ueland: That is objected to as irrelevant and immaterial.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

A. I think she did.

Cross Examination.

By Mr. Ueland:

When I say that I think Mrs. Clark said she would like to have the opinion of her husband, I mean by that I heard her say that. I remember it independently of what I have been told by others.

I mean that she saw her husband before the time the jury retired. Other members of the jury were seeing members of their families during that period.

ARTHUR J. ELMQUIST, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside at Paynesville, Minnesota. I was one of the jurors in the Foshay case. During the time that I was a juror, I had occasion to get acquainted with Mrs. Genevieve A. Clark. At the time that I had my meals I sat close to Mrs. Clark, right aside of her.

Q. Before the jury went out to deliberate, do you remember any conversation with Mrs. Clark in respect to the Government?

Mr. Ueland: Just a moment. That is objected to as a violation of the respondent's privilege, and incompetent, irrelevant and immaterial.

Judge Nordbye: The objection is overruled.

Mr. Ueland: Exception.

41 A. No, I did not hear no conversation.

Q. After the jury was deliberating, did you hear any statement made by Mrs. Clark concerning an arrangement for a large sized loan?

Mr. Ueland: The same objection as the last.

Judge Nordbye: The same ruling as we have heretofore made.

Mr. Ueland: Exception. May the objection and exception apply to this entire line of questioning?

Judge Nordbye: It may be so understood.

A. I heard it; where it was, I do not know—in the jury room or in the dining room, or wherever it was.

Well, I don't remember—either place, I don't remember where. It was during the time that I was acting as a juror in that case. Well, she said that Mr. Foshay went East to make a loan of eighteen million dollars, but he came home without a penny. I did not hear any testimony in the case about Mr. Foshay going East to make a loan of eighteen million dollars, or any such sum.

Mrs. Clark stated which way she was voting. Questions were then put to her by the other jurors as to her reasons for so voting. Mrs. Clark gave reasons for so voting. Yes, she said that she did not want to convict these seven men to prison. No, she did not discuss any of the evidence that was introduced in this case, as to why she voted that way. Yes, an effort was made on the part of the other jurors to get her to discuss the evidence, or to give some reasons why she did not—why she was voting that way, other than she did not want to send them to the penitentiary. Well, the foreman was working with her all the time, and two or three of the other jury men tried to help her and assist her as much as they could.

Q. And what would her response be?

A. Well, she did not seem like she was interested.

I remember the Sunday that we were out. We worked that day until three o'clock. Well, Mrs. Clark told us right
42 after we came back from lunch, that we were going to go home at three o'clock. Well, then, the boys said that they wanted to deliberate a little longer. She said no, she was not feeling well, she was going home and go to bed.

No, I did not hear any statement made by her with respect to her husband. No, I did not hear any discussion as to Mr. Coble—a discussion or statement as to Mr. Coble.

Well, we wanted to deliberate in the evening. Mrs. Clark objected to it. Well, for one reason, she said she did not want to work nights, and she said, if we were ordered to work nights, she would be sick. If we were ordered to work nights, she would be sick.

Mr. Ueland: No cross examination.

FRED FOSS, being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Horowitz:

I was one of the jurors in the so-called Foshay case. I reside in Minneapolis, and have all my life practically.

Before we went out to deliberate, I recall a discussion, or a statement made by Mrs. Clark in the dining room in the An-

drews Hotel, with respect to the Government.

Q. What statement did she make?

Mr. Ueland: That is objected to as calling for a violation of the privilege of the respondent, and incompetent, irrelevant and immaterial.

Judge Nordbye: The same ruling as has been heretofore made.

Mr. Ueland: Exception, and may it be understood that the objection goes to the entire line of testimony?

Judge Nordbye: Yes.

A. Well, she made the statement that she did not have no use for the Government, on account that they did not use
43 the soldiers right when they came back from the war.

Well, I could not say how that discussion came up. It seems like we were talking about the attorneys at that time, or something on that order.

Well, I heard a statement with respect to Mr. Foshay, and some loan that he was supposed to have arranged, but I would not say that she made it, or that she said it, because I cannot recollect. No, but I heard it said in the jury room, but I don't know if she said it, or who said it. During the time that the jury was out deliberating, Mrs. Clark made it clear to me how she was voting.

She stated how she was voting. Well, she said that she did not want to send these seven men to the penitentiary; she did not feel justified to do that. Well, no, I don't think I made any reply to that directly. Yes, it seems to me, I think some of the boys made a reply to that, but who it was, I could not say. The statement made was something about—that we could not decide this case on sympathy. We had to go by the evidence that we had, and the law of the Court.

During the time we were deliberating Mrs. Clark did not say that she had worked for the Foshay Company. I never heard that until I seen it in the paper. She did not make mention of the fact that her husband was the president, for a period of about ten years, of the Citizens State Bank of St. Paul. She did not make any statement in the jury room, nor did I ever hear her make a statement to the effect that her husband had had business transactions with Mr. Foshay and the Foshay Company.

I remember a statement made by Mrs. Clark concerning one of the witnesses who testified, Mr. Coble. Well, she said that she would like to choke him to death, for one thing.

Q. And did she say why?

A. Yes; on account of that he has been a witness in some case—I think down South somewhere, and he was supposed to have told a lie, and came pretty near sending this party to the

penitentiary, you know, but they found out that it was a lie.

44 No, I don't think she did say where it was that she got this information about Mr. Coble.

Cross Examination.

By Mr. Ueland:

I heard somebody mention the Foshay loan. I heard that in the jury room. Well, I did not say that she said it. It might have been some other juror, yes. Well, I could not say either way; I could not say, but I am sure that I heard it in the jury room, but who spoke it out, I could not say.

Re-Direct Examination.

By Mr. Horowitz:

Q. Let us see if we can get that clear. Did this conversation about the eighteen million dollars, or the loan that Mr. Foshay was contemplating under the circumstances—did some other juror or Mrs. Clark say that she understood that to be the fact?

A. Well, I could not say. I think she is the one that said it, but then, I am not sure, you know.

LOUIS J. WILLIE, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside in Minneapolis. My business or occupation is real estate business. My office is 519 Palace Building. That is not at 407 or 417 South Fourth street. It must be about five or six blocks from there, I assume.

I know Genevieve A. Clark. The first time I met Mrs. Clark was on the morning that the jurors were called to report, in the Foshay case. I met her at the office, at 519 Palace Building. Mr. Clark was with her. I know Mr. Clark. I am associated with him in business at this time under the name Willie & Clark. Willie & Clark does a real estate busi-

45 ness. Mr. Clark and I have been associated in the real estate business under the name of Willie & Clark for I will say for from four to five months; for the past four to five months.

Cross Examination.

By Mr. Ueland:

I would term it a partnership. No. I have some individual business that does not belong to Willie & Clark, and I assume Mr. Clark has some business that does not belong to Willie & Clark.

(Defendant's Exhibit A marked for identification by the reporter.)

It seems to me that there was a written agreement entered into between Mr. Clark and myself probably prior to that time. Not all of our business relationships were covered by that agreement during that period, I would say. I think that agreement might have been modified through verbal agreement or understanding.

Exhibit A is the agreement in writing that I refer to, yes.

Sometime during the month of June or July, I believe, we had a C. R. Haney, and Mr. Clark and myself in the office, and we agreed to handle the matter as a sort of a partnership. We have used the name "Willie & Clark" on certain properties at Presidio. We have used the name on certain properties at Presidio, in the way of obtaining insurance on the properties as an illustration. No, I don't think that was pursuant to this agreement. Why, yes,

Why, yes, I think this firm of Willie & Clark keeps books. Well, I don't keep the books in the office. Miss Todd is in the office, and she keeps those records.

Q. Well, since that date have those books been kept as the books of Willie & Clark?

A. I can't answer that question without going to the records.

We have not carried our real estate business on altogether, as Willie & Clark. I think I testified a minute ago that I have some individual interests that are not in the partnership, and I understand Mr. Clark has. I have some interests at
46 Finlayson, Minnesota, and I have some individual interests at Presidio, Texas.

Judge Sanborn: What proportion of the business was your individual business, and what proportion partnership business?

The Witness: Probably 25 per cent would be my individual business, that goes through the office.

Well, Mr. Haney and Mr. Clark and myself—that was subsequent to that written agreement—agreed to handle certain properties at Presidio, and I acquired certain contracts down there that belonged to the joint interests of us, that is, the three of us. Then later on Mr. Haney's interest was taken over by us, and as I understand the verbal agreement now, the interest is with Mr. Clark, Miss Todd and myself. That verbal agreement was entered into, I would say just for memory, three or four months ago.

Q. Isn't it a fact that that verbal agreement was not to take effect until September 1st?

A. No, I could not testify to that.

The office of the firm called Willie & Clark is at 519 Palace

Building. Presidio, Texas Company, Air Right Corporation and Louis Willie is what appears on the door. Just from my memory I would say that Mr. Clark came over there—that it was in last April that Mr. Clark came into the office, just the exact date he moved over there or came over there, I don't know—I don't recall, but I understood at that time he was in an office somewhere on South Fourth street, but I was only over there one time, I think, once or twice, at his former office. I don't know when Mr. Clark abandoned his other office. I have no way of knowing.

Well, now, this agreement, Defendant's Exhibit A, has reference to the sale of certain lands in Texas, and under this agreement Mr. Clark is to receive certain commissions. Now, the next verbal arrangement was entered into with Mr.
47 Clark and I and Mr. C. R. Haney. I would think that was three or four months ago. That did not cover all the property that I have there, no. The verbal agreement covered everything except property that we had purchased and paid for and to which we were to receive deeds, the title. It covered everything at Presidio. I had other real estate at Presidio. So far as I know, Mr. Clark had other real estate interests, too; I presume he did, yes.

This agreement between Mr. Haney, myself and Mr. Clark, it affected practically all of the property which we had contracts on at that time, and which we were to contract for later on, at Presidio. At Presidio only. And in the meantime I retained my interests, my individual interests, in other property. Yes, at Presidio. Yes, I have some interests up here at Finlayson, Minnesota. That of course is not a part of the partnership. And then after Haney passed out of the picture, Mr. Clark and I and Miss Todd. Miss Todd's interest is, if my memory is right on it—it is 33 1/3 per cent each—one-third to Mr. Clark, one-third to me, and one-third to Miss Todd. And that is the Presidio property. We use the same office, Mr. Clark and I, but I am not in the office all of the time. And for a while Mr. Clark had an office of his own.

ALICE B. TODD, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

I live in Minneapolis.

Mr. Ueland: Excuse me, Mr. Horowitz. I intended to offer this Defendant's Exhibit A as part of the cross examination of Mr. Willie. May I do so now?

Mr. Horowitz: No objection.

Judge Nordbye: It may be received.

48 Exhibit A is as follows:

"Memorandum of Agreement.

"Whereas, Louis Willie of Minneapolis, Hennepin County, Minnesota, or the Presidio Texas Company, 519 Palace Building, Minneapolis, Minnesota, own and control certain option contracts to purchase certain lots located in the City of Presidio, Presidio County, State of Texas, and

"Whereas, D. D. Clark of Minneapolis, Minnesota, desires to assist in the sale of said properties,

"Now, Therefore, it is mutually agreed and understood by and between the said Louis Willie, acting on behalf of himself and the Presidio Texas Company, and D. D. Clark, as follows:

"There shall be paid to Louis Willie a sum of One Hundred Fifty Dollars ($150.00) for each lot in the Fort Leaton Addition to Presidio sold by or through D. D. Clark and Louis Willie jointly or separately, and out of this said One Hundred Fifty Dollars for each lot so sold there shall be paid to D. D. Clark a sum of Ten Dollars ($10.00) for each lot so sold; said Fort Leaton Addition now containing approximately ninety (90) lots unsold.

"There shall be paid to Louis Willie a sum of One Hundred Ten Dollars ($110.00) for each lot in the Kleinman Addition to Presidio sold by or through D. D. Clark and Louis Willie, jointly or separately, and out of this said One Hundred Ten Dollars for each lot so sold there shall be paid to D. D. Clark a sum of Ten Dollars ($10.00) for each lot so sold; said Kleinman Addition now containing approximately one hundred thirty (130) lots unsold.

"There shall be paid to Louis Willie a sum of Eighty Dollars ($80.00) for each level lot in the Sierra Vista Addition to Presidio sold by or through D. D. Clark and Louis Willie, jointly or separately, and out of this Eighty Dollars ($80.00) for each lot so sold there shall be paid to D. D. Clark a sum of Ten Dollars ($10.00) for each lot so sold; said Sierra Vista Addition now containing approximately four hundred (400) such level lots unsold.

"There shall be paid to Louis Willie a sum of Thirty-five Dollars ($35.00) for each hill lot in the Sierra Vista Addition to Presidio sold by or through D. D. Clark and Louis Willie, jointly or separately, and out of this Thirty-five Dollars for each lot so sold there shall be paid to D. D. Clark a sum of Five Dollars ($5.00) for each lot so sold; said Sierra Vista Addition containing approximately eight hundred (800) such hill lots unsold.

"And it is mutually agreed and understood between the said D. D. Clark and Louis Willie, that they shall, jointly or separately, endeavor to sell all or as much of the above described

property as possible at the best price and figure obtainable, and the proceeds in excess of the prices above fixed for each lot shall be divided equally between the said D. D. Clark and Louis Willie on the basis of fifty per cent each.

49 "It is further understood that the said Louis Willie and D. D. Clark contemplate acquiring options or sales agency contracts covering other properties at Presidio, the descriptions of which are unknown to either of them at this time, consisting of both city lots and irrigable farm lands and it is agreed between the said Louis Willie and D. D. Clark that whatever property shall be taken under option or under sales agency contract by them shall be obtained at the lowest possible price and shall be by the said Louis Willie and D. D. Clark sold to the best advantage and the profits of said sales shall be divided equally between the said Louis Willie and D. D. Clark on the basis of fifty per cent each.

"The said D. D. Clark agrees to advance $500.00 in cash, at the signing of this agreement for the purpose of making the initial payment due the Land Value Refunding Company of New York in connection with a bond to be issued by the said Land Value Refunding Company. As and when these lots are sold and the purchaser who desires a bond issued by the Land Value Refunding Company to be placed upon the property, the premium to be paid by such purchaser in the amount of six per cent on the face of the bond shall be paid to the said D. D. Clark up to an amount equal to the initial $500.00 payment to the Land Value Refunding Company.

"It is agreed that in the event either party to this agreement is dissatisfied or wishes to discontinue the joint working arrangement herein provided, then and in that event such party shall give the other notice in writing at least sixty days prior to such discontinuance and, at the expiration of said sixty days this memorandum of agreement shall be of no further force or effect, provided, however, such notice of cancellation shall have no effect upon contracts entered into for the sale of said property which have not been fully paid for by the purchaser or purchasers at the time of such cancellation.

"Dated at Minneapolis, Minnesota, this 29th day of April, 1930.

Louis Willie,
D. D. Clark."

I am acquainted with D. D. Clark, the husband of Genevieve A. Clark. I am acquainted with Mr. Willie who just preceded me on the stand. I am employed by Mr. Willie. The office is at 519 Palace Building. The office has been in those particular rooms since December of last year, I think. Prior to that they were on the eighth floor in the same building.

I think I met Mrs. Clark the first time sometime during August of this year. I met her at our office, I believe. When I say our office I mean 519 Palace Building in this city. Yes, she has been in the office a few times. The last time was
50 Saturday, I think.

I recall the time when the jury was being selected for the so-called Foshay case. Yes, she came into the office, I think, the morning that she was called for jury duty here. She came with either Mr. Clark, or came there to meet him, I think. I am there in the office about all the time.

From time to time I have had phone calls for Mr. Clark, from his wife. Well, since July, I think Mr. Clark has been in the office sometime during the day, usually each day. We have four rooms in that office. One of those rooms is assigned to Mr. Clark at the present time. Well, I don't know whether I can answer definitely for how long it has been. I think probably for three months—perhaps four.

During the trial of the Foshay case, Mr. Clark would be in the office from time to time. I remember the particular time when Mr. C. M. Cobel was giving his testimony; I remember the time when it appeared in the papers. A photograph appeared in one of the papers of Mr. Cobel. I saw that. After I saw that in the newspaper I had a conversation concerning Mr. Cobel. Well, I presume it was with Mr. Clark. I remember talking about it to someone in the office. I think Mr. Clark was there at the time I talked about it.

Q. And what did you say about knowing Mr. Cobel?

Mr. Ueland: Just a minute—objected to as incompetent and irrelevant, not binding on the respondent.

Judge Nordbye: We will receive it subject to the objection and entertain a motion to strike if it does not become material.

Mr. Horowitz: We will connect it up, we believe.

Q. (Continued.) What did you say about Mr. Cobel at that time?

A. Well, I recall saying that I knew Mr. Cobel—I had known of him in Kansas City, my former home.
51 I said I knew Mr. Cobel because of some work that he did in connection with a case, with a concern that I was interested with there in Kansas City. He prepared some of the testimony for the Government in that particular case, and I recall stating that I knew him, and of his preparation of the work in that case. I believe I expressed myself as not being thoroughly satisfied with Mr. Cobel's preparation of the figures in that case. I felt that they were not quite fair. That was in connection with the so-called Craven case in Kansas City. I had occasion to come in contact with Mr. Cobel during the time he was preparing that case. Yes, I

did. Very frequently. I had to call on him for records. I had to call on him for records myself.

Mr. Ueland: May it be understood that I object to this entire line of inquiry?

Judge Nordbye: Yes, your objection may stand, Mr. Ueland.

I was present during the entire proceedings of that case, during the trial of that case in Kansas City. Mr. Cobel did not testify in that case. I think he prepared the statements for the man that did testify. The man who testified was Mr. Bennett. I think I told Mr. Clark about these facts that I have just related here.

Previous to September 1st I don't think I ever would have had occasion to speak to Mr. Clark about Mr. Cobel.

Mr. Ueland: I move to strike out the testimony about the Cobel conversation.

Judge Nordbye: Does counsel contend that he is going to connect it up?

Mr. Horowitz: Yes, we will connect it up with another witness.

Judge Nordbye: Motion denied.

Cross Examination.

By Mr. Ueland:

I am associated with the firm of Willie & Clark, yes.

52 Well, I think probably the first business transaction in that name was in July. I believe the 1st of September was the first time they made a commercial report as to there being a firm of Willie & Clark. You refer to the Bradstreet report prepared on that date? Yes, that is true.

Q. In what other way did they do business as Willie & Clark before that?

A. I think there was a transaction prior to that time in connection with insurance on the property at Presidio. The exact date of it I don't know.

Q. Was this firm as you call it, formed all at once, or was it by a gradual association?

A. Mr. Clark was in and out of our office for several months. First, I believe, in connection with the property—I think Mr. Clark has some interests there of his own, that are not connected with the partnership arrangement, and really the partnership arrangement was an outgrowth of the fact that he had interests there, as well as Mr. Willie's interests there, so that it is a little difficult to determine the exact date of when the partnership actually commenced.

The business of the partnership at the present time is the sale of property at Presidio, Texas. We are not interested in real estate elsewhere.

I am not familiar with Mr. Clark's private business, but I think he has other interests. At the present time he gives about all of his time to Willie & Clark, I think. During last summer he was in and out of the office, but looking after his affairs as well.

Q. What I am trying to get at is this—I will put it this way: Was there any date when Mr. Willie and Mr. Clark and you came together and said definitely, "Now we are going to be partners as Willie & Clark Company."

A. That is the reason I mentioned the date I did in August, in connection with an application that we made at that time for insurance on the property there, land value insurance on the property at Presidio. As I recall it, that was the
53 first time that we had definitely used the name of Willie & Clark.

Q. Didn't you tell Mr. Clark last Friday that the first act taken by this firm of Willie & Clark was on September 1st?

A. No, I don't know that I did. I don't remember that, but I recall that I looked up for Mr. Clark the date of the Bradstreet report, and told him that that was September 1st.

Judge Sanborn (to witness): Did you open a set of books under the name of Willie & Clark?

The Witness: No, we do not carry the books that way. They are carried through Mr. Willie's account.

Judge Sanborn: Were any letterheads printed with the name of the firm on them?

The Witness: No.

MRS. ANN B. HENDERSON, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside in Minneapolis at present. I was sworn in as a bailiff in the Foshay case, the so-called Foshay case. The only woman juror was Mrs. Genevieve A. Clark.

Q. And at the time that you were sworn in did you understand that no one was to speak to Mrs. Clark excepting that an order of the Court was made granting such permission?

Mr. Ueland: Objected to as irrelevant and immaterial, and not affecting this respondent.

Judge Nordbye: She may answer.

A. Yes, sir.

I met her husband, Daniel D. Clark, after the jury was locked up. The jury was locked up on September 1st, 1931, yes. I think it was close to a week after that that I met him for the first time. I met him on the mezzanine floor in the hotel.

Q. And at that time did he speak with Mrs. Clark?

54 Mr. Ueland: May it be understood that my objection goes to this entire interrogation?

Judge Nordbye: Yes.

Mr. Ueland: Exception.

A. Yes, he did at that time.

Q. Had you procured an order from Judge Molyneaux or any other judge? A. I had received my instructions—

Q. Just a moment—just answer my question, please—had you procured permission from Judge Molyneaux or any other judge to permit Mr. Clark to visit and talk with his wife?

A. Well, I had my instructions given to me by my superior officer, Mr. Beatty.

Q. Now, in answer to the question, state whether or not you had gotten such permission from Judge Molyneaux?

A. No, sir. I had not gotten such an instruction from any other judge.

Q. How did it happen that Mr. Beatty gave his consent to that procedure? A. All I know is—

Mr. Ueland: I object to that as irrelevant and not affecting this respondent.

Judge Nordbye: She may answer.

Mr. Ueland: Exception.

A. We were at the hotel close to a week before Mrs. Clark saw anyone. Mr. Beatty came—I believe it was the Saturday morning following the lock-up—and stated that Mrs. Clark might see her family.

No request made by me to Mr. Beatty or by Mrs. Clark in my presence to Mr. Beatty asking for such permission, or asking that that be granted. Mr. Beatty was the one who volunteered the information that her family might visit her.

Sometime after that Mrs. Clark and I visited a Mrs. McFarland. We visited Mrs. McFarland at some distance from the Andrews Hotel, in St. Paul. The date that that visit was made was September 25th. I did not get permission, but Mr. Beatty during the recess took Mrs. Clark into Judge Moly-

55 neaux' chambers and got permission for her to visit this sick friend.

Q. Now, before Mr. Beatty took Mrs. Clark in to see Judge Molyneaux, had you received any telephone calls from Mr. McFarland, or someone representing himself to be Mr. McFarland?

A. Well, I recall that I was called to the telephone—I think it was at the luncheon hour—and Mrs. Clark had not felt very well, and he inquired how she was, and he told me to tell Mrs. Clark that Mrs. McFarland was quite ill.

I conveyed that information to Mrs. Clark. I told Mrs.

Clark that information came to me by telephone. Then I received another call from Mr. McFarland stating—well, let's see how that was—well, in the meantime I had told Mrs. Clark that Mrs. McFarland was quite ill and she said she was almost like a mother to her, and she would like to see her before she passed away, so that is how she came to ask Mr. Beatty if she could get permission to go and see her. I did not hear her ask Mr. Beatty. No, I was not in the room. Mr. Beatty did not go into the court or go into the hotel and see and talk with the different jurors.

It seemed that we planned to go on a Sunday, and Mr. McFarland called up and told me to tell Mrs. Clark that he would let us know when she could come, when Mrs. McFarland would be able to see her. At the present time she was very bad. Then I got a telephone call, telling me she could come on Friday, or any time we wanted to, and we decided to go on Friday, the 25th. I told Mrs. Clark I had received the second telephone call. Mrs. Clark knew there were two telephone calls.

I sat in the court room during most of the Foshay trial. I remember that that pillar over there, where that lady with the black hat is sitting, that there was a large filing cabinet. And in front of that filing cabinet there was a chair in which was seated a Mrs. O'Hearn. That is the same lady that is now sitting in approximately the same position that
56 she then sat. I have known Mrs. O'Hearn for some time. I have known her, oh, I should say, possibly, about 20 years or more. No, I didn't know Mrs. Mabry, the wife of one of the defendants in that case, personally. I knew her to see her. I did not know who she was.

Q. Well, now, during the course of the trial did you not at one occasion tell Mrs. Clark that Mrs. O'Hearn was a friend of yours and a sister of Mrs. Mabry?

Mr. Ueland: Is this still under my objection, or shall I repeat my objection?

Judge Nordbye: You better state your objection again, Mr. Ueland.

Mr. Ueland: Objected to as incompetent, irrelevant and immaterial, and not within the issues of this matter.

Judge Nordbye: Objection overruled.

Mr. Ueland: Exception. May that objection go to this entire conversation?

Judge Nordbye: Yes, it may be so understood.

A. Yes, sir.

Q. And during the trial, Mrs. Mabry, the wife of one of the defendants, sat next to Mrs. O'Hearn?

A. Well, of course I didn't pay much attention to that, because I sat on that side, and I would see them when I came in, and that's all.

I did take occasion to tell Mrs. Clark that Mrs. O'Hearn was a sister of Mrs. Mabry. I don't remember telling Mrs. Clark that Mrs. O'Hearn had been in the court room almost every day.

While we were out at recess—I think it was during a morning recess, one morning recess—I don't recall just the exact time, or the day, rather, and I had spoken to Mrs. O'Hearn—we stood around out in the corridors—and Mrs. Clark said, "Now, it seems to me I know her. What is her name?" I said, "Her name is Mrs. O'Hearn." She said, "Oh, yes, I met her about seven years ago when I lived in St. Paul."

57 I did not know that Mrs. Mabry was Mrs. O'Hearn's sister, at that time. I don't know when I learned that Mrs. Mabry was Mrs. O'Hearn's sister. Somebody just happened to mention it to me. Somebody here in the court room. I don't recall who it was. And when that was mentioned I conveyed that information to Mrs. Clark.

Possibly I likewise conveyed the information to Mrs. Clark with reference to the school that Mr. Maslon attended. I had heard it just here in court, you know. Possibly I told that to Mrs. Clark, too. I just don't recall whether I did or not.

Q. Did you convey to Mrs. Clark the information about this $18,000,000.00 loan that Foshay had arranged for in New York before the crash?

A. No, I don't remember of ever saying anything like that.

Q. You say you don't remember ever saying it. Do you say that you did not say it? A. No, I will say I did not say it.

Q. Now, how many times did Mr. Clark visit Mrs. Clark after that first time? A. After the first week?

Q. Yes.

Mr. Ueland: I would like to have it understood that my objection goes to this line of testimony, and the exception also.

Judge Nordbye: Yes, it may be so understood.

Mr. Ueland: And my exception also?

Judge Nordbye: Yes. She may answer.

A. On an average of once a week.

I think the last time that Mr. Clark visited Mrs. Clark was before the jury was charged, a night or two before that. I think it was a night or two before the jury was locked up. I just don't recall the exact date. I mean a night or two before Judge Molyneaux gave them the charge. I don't remember of Mrs. Clark saying that Mrs. O'Hearn had been a depositor

in her husband's bank at St. Paul. I don't recall whether Mrs. Clark told me that Mr. Mabry had been a depositor at
58 the Citizens State Bank in St. Paul. I don't recall her saying anything about Mr. Mabry. Mrs. Clark did not say anything about any of the other defendants in the case, or any of the attorneys in the case. I have forgotten how it happened that I told Mrs. Clark about the school that Mr. Maslon attended. Somebody just happened to tell me here in the court. I just gave her that information.

Mrs. Clark and I occupied the same room at the Andrews Hotel. A friend of mine, a Miss or Mrs. Martin, would call to visit me. She came for a little while, once in a while. Mrs. Martin spent a good deal of her time in the court room here. She was quite interested in the case, you know—a large case. In the evening she would go over to the hotel and visit with me. Not very often. Possibly about once or twice a week. I would talk with her on the mezzanine floor in the hotel. At that time I had Mrs. Clark in the room, locked up.

The only telephone calls that went out from the hotel were put through by me from the room. I think I called up once or twice. The first time was September 1st, telling Mr. Clark to bring down certain clothes. I think it was around that time. I am not quite positive of the date you know. And the second time was when I called up for—to give him a message or something—oh, yes—to ask if there was a letter came from her mother from out west some place. The first call that I made was not to the office—the first call I made was to the house.

Q. Yes. And thereafter the first call that you made to Mr. Clark, you made to the telephone at 519 Palace Building to tell Mr. Clark that it would be all right for him to visit his wife?

A. Well, maybe that might be correct, but I know that I called up the first night when we were locked up, telling Mr. Clark that Mrs. Clark was locked up, and that she wanted certain wearing apparel, which he brought down and left at the desk, and Mr. Heimbach got it for me and gave it to me —Mr. Heimbach, the other officer in charge of the men jurors.

59 Cross Examination.

By Mr. Ueland:

Mrs. Clark did not talk to her husband over the telephone. She never talked over the telephone.

Examination continued by Judge Sanborn:

Q. On these visits that Mr. Clark made to Mrs. Clark, was the conversation that they had in your presence? Were you

present at the same time?

A. At all times, Judge Sanborn, yes.

Q. You were always there?

A. Always sitting very close, within hearing distance.

Q. Well, would you say that there was any conversation which they had that you did not hear?

A. I heard their conversation. It was pertaining to their home and their children and current expenses of the house, or bills that he was to take care of, that she always took care of.

Q. Do you feel that you heard every word that was said by Mr. Clark to Mrs. Clark?

A. Yes, sir.

Q. And by Mrs. Clark to Mr. Clark?

A. Yes, your Honor, I did.

Q. And that would be true as to every visit that was made?

A. Yes, sir.

Re-Direct Examination.

By Mr. Horowitz:

Q. And you would say that that was true, each and every time, that you were right close by them?

A. Well, Mr. Horowitz, they perhaps sat on a settee and I sat in a chair over at the side.

There was a telephone in my room. Yes, but I had given instructions that I was the only one to put in calls going out, or to receive any coming in, and when I left the room, if I did, I always informed the operator that I was going to be out, and if I was there on the mezzanine floor, if there was a call came for me, I took it at the stenographer's desk there.

There was a phone in the hall there.

60 PALMER V. MABRY, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

(Government's Exhibit 5 marked for identification by the reporter.)

I was one of the defendants in the so-called Foshay case. I transacted business with the Citizens State Bank of St. Paul as a depositor. Government's Exhibit 5 is a signature card of that bank. I started doing business with the Citizens State Bank of St. Paul, as I recall now, it was in the year 1921.

Mr. Ueland: No objection to Government's Exhibit 5.

The Court: It may be received.

Exhibit 5 is as follows:

"P. V. Mabry—2727-12th Ave. No.

Citizens State Bank of St. Paul, Minn.

Minneapolis

Below please find duly authorized signatures which you will recognize in the payment of funds or the transaction of other business on our account.

Yours truly,

Business Introduced by

Date Jan. 22 1925"

The Citizens State Bank of St. Paul is a small bank. At the time I started doing business with them, they had, oh, I can't tell exactly—I don't believe more than half a dozen employees there. I ceased doing business with them, I would say, either in 1924 or 1925.

During that period of time I became acquainted with the husband of the respondent here, Mr. D. D. Clark. In addition to depositing money at that bank, I likewise borrowed money from that bank from time to time. At the time I borrowed money, I would make my arrangements with Mr. Clark.

Q. You knew Mrs. Clark, didn't you?

A. No. I don't know whether she was in the bank there in 1921 or not.

Q. Don't you remember any woman that worked as a teller during the time you did business there?

61 A. It is possible. It is not definitely fixed in my mind.

I was a fairly frequent visitor at that bank. At that time I was a retail automobile salesman in St. Paul. I think the deposits made by me were on the average of about once a month.

(Government's Exhibit 6 marked for identification by the reporter.)

Mr. Horowitz: At this time we offer as Government's Exhibit 6 the original ledger sheets of the account of this witness at the Citizens State Bank, consisting of ten sheets. Unless you want further foundation—

Mr. Ueland: I would like to ask a question.

Cross Examination.

By Mr. Ueland:

Well, I believe I am in error now. The question was asked when I started doing business. There were deposits made in that bank as early as 1917 and 1918 when I was in the service. Those deposits were made by the Treasury Department of the United States Government.

Q. I asked you about the period from 1921 on. Were you making all of your deposits personally, or were they made by a stenographer or a clerk or someone?

A. No, I think most of them were personal deposits.

Judge Nordbye: Exhibit 6 may be received.

Exhibit 6 consists of ten (10) sheets, covering the deposit account of P. V. Mabry with the Citizens State Bank of St. Paul, the first deposit shown being March 2, 1921, and the last withdrawal shown being May 27, 1926, when the account was closed. An aggregate of 198 deposits are shown, and likewise an aggregate of 1,317 withdrawals. During the period in question the highest deposit balance shown is $1,642.02 and the lowest balance $14.92 overdrawn.

Direct Examination.
(Continued.)

By Mr. Horowitz:

62 This automobile concern that I was working for was about two miles away from the Citizens State Bank of St. Paul. I think I knew that Mrs. O'Hearn was a depositor in that bank. I am not sure about her husband. I did not know that she and her husband or one of them borrowed money from time to time from that bank.

Q. The indictment in the Foshay case was returned sometime in February, 1931. Subsequent to that date did Mr. Clark call on you?

A. I can't say whether it was before or after the indictment date. He did call on me, however, in my office on the fourth floor of the Foshay Tower.

Q. At that time was there any discussion about the fact that you had been indicted?

A. I don't remember of it particularly.

Q. Did you talk to him about it or did he talk to you about it?

A. No. It was a very casual meeting. I don't recall at this time any particular conversation on the subject. I knew Mr. Clark.

Q. When did you learn that your sister-in-law, Mrs. O'Hearn, was acquainted with Mrs. Genevieve A. Clark?

A. I never knew she was acquainted with her.

Q. When did you learn for the first time that Mrs. Clark knew Mrs. O'Hearn?

A. I didn't know that.

When I worked for the W. B. Foshay Company, at first, I worked in the St. Paul office. I was for a brief time in the sales office in St. Paul of the W. B. Foshay Company. That was in the spring of 1924. Up to that time I had known Mr.

Clark for some considerable time, through my seeing him at the bank, yes—purely business matters. Every time I wanted to borrow some money I would see Mr. Clark about it.

Q. And Mr. Clark, instead of calling you Palmer, always called you Paul?

A. Well, I don't recall that particularly. He may have. When I was a salesman for the W. B. Foshay Company in 1924, I think I called on Mr. Clark. I believe I tried
63 to sell him securities.

I remember Mrs. Clark being examined as to her qualifications to act as a juror by Judge Molyneaux. I remember that she stated that her husband was D. D. Clark. Just a minute—I don't recall the initials particularly. I remember the name. At the time Mrs. Clark was examined, I had not the slightest idea who she was. I don't believe I saw Mr. Clark in the court room during the trial of this case at any time. I don't recall it.

Q. Do you recall the time when Judge Molyneaux had completed instructing the jury and you were sitting on that side of the court room with Mr. Welch and with Mr. Andrus, and the three of you were laughing about the whole matter?

Mr. Ueland: May my objection last made go to this entire matter?

Judge Nordbye: Yes.

Mr. Ueland: Exception.

(No answer.)

Q. And at the time that the three of you were sitting there laughing, didn't you know that Mrs. Clark was the wife of D. D. Clark whom you knew?

A. I did not of my own knowledge.

Q. Well, when you say you did not know it of your own knowledge, just what information did you have on the subject, from any source, at that time?

A. Well, I can tell you exactly what happened, so far as I was concerned. I had no idea who Mrs. Clark was for several weeks after the trial started. Mrs. Mabry was in attendance at the trial I believe during the closing arguments of counsel. I was talking to her one evening about that time, and she stated she thought Mrs. Clark was related to Mr. Clark, as she had seen him wave to Mrs. Clark or make some sign of acquaintanceship of some kind, and she thought on that basis, that there was a relationship. I think later on we put two and two together and after we had been discussing it, decided that
64 probably Mrs. Clark was Mr. Clark's wife.

The trial had been going several weeks when I figured that out. As I say, it was during the closing arguments of counsel.

Q. Well, did Mrs. Mabry come into the court for the first time during the arguments of counsel toward the last?

A. That is as I remember it, or shortly before that. I did not tell any of my attorneys that I knew Mr. Clark, and that Mr. Clark was the husband of one of the jurors.

Q. Was that the reason you were laughing there when the jury went out?

A. I can't recall the subject of our amusement.

Q. The jury was just going to go out to vote on your guilt or innocence, and the three of you sat there laughing?

A. That is possible.

Mr. Ueland: No cross examination.

ERNEST W. SWANSON, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Horowitz:

I reside in Minneapolis. I am connected with the Department of Commerce, Division of Banking, of the state of Minnesota. I was connected with that department of this state during the year 1925. I had occasion from time to time to look into the affairs of the Citizens State Bank of St. Paul. I knew the husband of the respondent, Mr. D. D. Clark.

I have a memorandum of a meeting of the board of directors attended by the Commissioner of Banks, and myself. I remember the meeting independent of that memorandum. That meeting took place about the middle of August, 1925. Mr. Clark was present at that time. Mr. Clark had been under fire for some time for things that we considered were contrary to sound banking principles, some of the things he had done,
65 and the commissioner, Mr. Veigel, insisted at that time that Mr. Clark resign. Either that evening or a day or two later Mr. Clark resigned. It was understood at that time that he would resign. He resigned as president of the bank.

I have a card record which runs up to 1928 from the time the bank was organized. We got annual reports from the bank relative to the stockholders' meetings, and various reports sent in by the bank or officers of the bank. I just brought the record for 1925, according to the subpoena, except that this card covers that period, and it is our record of the officers.

Mr. Horowitz: Counsel has admitted that the respondent was employed by the W. B. Foshay Company, and I have two checks here which are endorsed by her, which we would like to offer in evidence, without additional proof, unless counsel insists on it.

(Government's Exhibits 7 and 8, checks just referred to, marked for identification by the reporter.)

The Court: They may be received.

Exhibit 7 is as follows:

"Voucher No. 7/600 List No. 8762 Check No. 9325
Minneapolis, Minnesota Jul 13 1929

Effective July 9th

Pay to the order of Genevieve Clark $19.58
Nineteen and 58/100 .....Dollars

W. B. Foshay Co.
By H. E. McGinty,
Treasurer.
E. J. Bouchard,
Asst. Treas.

First Minneapolis Trust Co.,
Minneapolis, Minn.

(Endorsement:) Received from W. B. Foshay Company, Minneapolis, Minn. The amount of this check in payment of account as shown on statement on face hereof. Genevieve Clark, 4641—17 Ave. So. D. D. Clark."

Exhibit 8 is as follows:

"Voucher No. 7/800 List No. 9462 Check No. 9562
Minneapolis, Minnesota Jul 20 1929

Four days salary.

Pay to the order of Genevieve Clark $15.67
Fifteen and 67/100 .....Dollars

W. B. Foshay Co.
By Melvin S. Anderson,
Compt.
Geo. A. Smith,
A. Treasurer.

First Minneapolis Trust Co.
Minneapolis, Minn.

66 (Endorsements:) Received from W. B. Foshay Company, Minneapolis, Minn. The amount of this check is payment of account as shown on statement on face hereof. Genevieve Clark.

Paid thru Minneapolis Clearing House, 1 Jul 24 1929 6 4th Northwestern National Bank, Minneapolis, Minn."

(Government's Exhibit 9 marked for identification by the reporter.)

Mr. Horowitz: At this time we offer in evidence as Government's Exhibit 9, the record of officers of the State Department, which we got from the witness, which shows that Genevieve Arundel was assistant cashier from January 13, 1920, to January 10, 1922.

Judge Nordbye: It may be received.

Exhibit 9 contains the following:
"State of Minnesota
Department of Banking

Record Officers
of Citizens State Bank of
Saint Paul

President	Ass't Cashiers	Directors:
D. D. Clark	Genevieve Arundel	D. D. Clark
From 8-16-15 to 8-15-25	From 1-13-20 to 1-10-22	From 8-16-15 to 8-15-25"

EARL A. MAHOWALD, a witness called on behalf of the Government, being first duly sworn testified as follows:

Direct Examination.

By Mr. Horowitz:

I live in St. Paul. I am cashier, Citizens State Bank of St. Paul. I have been cashier since July 1st, 1930.

(Government's Exhibit 11 marked for identification by the reporter.)

Government's Exhibit 11 is the official minutes of the directors' meetings of the Citizens State Bank of St. Paul from the time it was incorporated.

Mr. Horowitz: Yes, we offer page 80, and we likewise
67 offer page 140.

Mr. Horowitz: I would like to read two parts of this: "'Moved by Mr. Healy and seconded by Mr. O'Connell, that D. D. Clark be elected President for the ensuing year, C. A. Healy, First Vice President, D. E. O'Connell, Second Vice President, J. M. Hanson, Cashier, and G. Arundel, Assistant Cashier." That is from the minutes of the regular meeting of the Board of Directors of the Citizens State Bank held January 11, 1921. On page 140 appear the minutes of special meeting of the directors of the Citizens State Bank of St. Paul and one part reads: "A request was presented to this Board by the Banking Department, asking that Mr. Clark file his resignation as President of the Bank in writing. Mr. Clark was present at the meeting and agreed to do that."

Judge Sanborn: What is the date of that?

Mr. Horowitz: August 22nd, 1925.

(Letters marked for identification by the reporter as Government's Exhibit 12.)

Mr. Ueland: The exhibit is objected to as irrelevant and immaterial, and not within the issues of this proceeding.

Judge Nordbye: The exhibits may be received.

Mr. Ueland: Exception.

Mr. Ueland: No cross examination.

Exhibit 12 consists of the following letters and carbon copies of letters (eliminating duplications):

(Carbon copy)

"July 13, 1923.

Received of the Citizens State Bank of St. Paul, Minn., twenty shares of A. J. Kirstin Company Preferred Stock. Certificate #277 for ten shares and #278 for ten shares.

W. B. Foshay Company,
Per.....

Received check #921 for $1,975.10 drawn upon the Metropolitan National Bank of Minneapolis, Minn. in payment of the above certificates as follows:

#277 & #278.....	$1,940.00
Accrued Int.....	5.78
We refund to you by our cashier's ck. #8961	29.32
	1,975.10

Citizens State Bank of St. Paul,
By E. J. Woodard,
A. Cashier."

68 (Carbon copy)

"September 5, 1923.

Received of the Citizens State Bank of St. Paul, Minnesota, Certificate #429 for ten shares of the A. J. Kirstin Company stock, par value of $100 per share due the first day of September, 1923. for collections and returns.

Signed.
W. B. Foshay Company,
By.....

(Original,
W. B. Foshay Co. letter-head.)

"June 28, 1923
224.119.73

D. D. Clark, Pres.,
Citizens State Bank,
St. Paul, Minn.
Dear Mr. Clark:

"Your letter of the 26th at hand. It somewhat surprised me, as I had not realized just how my letter of the 22nd might have sounded to you.

"What I had in mind was that, from what Mr. Whiton said, you were not actually in need of money, but that the bank examiner wished you to have us repurchase this stock as we agreed to do. I took it that there would be no objection to our taking 30 days from June 12, allowing you to have that much longer time on the interest rate that these securities are bring-

ing you, and my real thought in writing was to ascertain if such an arrangement would be satisfactory to you.

"It also occurred to me that in the mean time Mr. Whiton might be able to sell you some other securities for this amount, so that when we repurchased the securities covered by certificates #277 and #278 of the A. J. Kirstin Company you would be in a position to buy a couple of thousand of some other securities from us. Believe me when I say that in reading over my letter of the 22nd I was considerably surprised, as it did not read at all as I had been thinking at the time I wrote.

"As I suggested, shall be very glad to have you drop in to see me sometime when you are downtown, and should like the pleasure of taking you to lunch so we can talk these and other matters over.

Sincerely,
(signed) Wilbur B. Foshay,
President."

WBF:DC

(Carbon copy)

"March 11th, 1925
175.73

Citizens State Bank,
Selby Avenue,
St. Paul, Minnesota.

Gentlemen:

"It is with regret that we have to announce that after some years of association with us, Mr. E. V. Whiton, one
69 of our St. Paul representatives, has decided to affiliate himself with another house, which means that he will no longer call upon you representing us.

"Our Mr. D. H. Comstock, will call upon you in his place within a very short time, and we trust that you will extend to him the same courtesies that you have heretofore extended to Mr. Whiton.

"You may rest assured that we appreciate the business you have given us through Mr. Whiton, and we trust that you will continue to favor us with your business through Mr. Comstock.

"We want to say that never in our history have we been in a more advantageous position to give you financial advice and service, and to furnish you with securities such as you should invest in. Our customers are receiving full protection on their investments with us, and in spite of the serious business difficulties prevailing in the past few years, we have been able to maintain our record and continue the use of our motto, of which we are justly proud, "All Your Money—All the Time—On Time."

Sincerely,

S. D. Rider
JM

Sales Manager."

(Carbon copy)

"April 7th, 1922.

Citizens State Bank,
St. Paul, Minnesota.
Gentlemen:

"Confirming our representative, Mr. E. V. Whiton's verbal agreement, we hereby contract to take off your hands, at any time on 30 days written notice, any or all of the following securities purchased from us:

"20 shares of the Bladwin Flour Mills Company Prior Lien Stock as evidenced by Certificate #40, and

"3,000 of the First Mortgage Bonds of the Theopold-Reid Company, due $2,000 October 1926, and $1,000 April 1927, as evidenced by Interim Certificate of the Lincoln Trust & Savings Bank, for which Definitive bonds will be delivered as soon as issued.

"It is understood that in repurchasing these securities we are to pay you 97 and accrued interest or dividends thereon.

Very truly yours,

WBF:EC President."

(Carbon copy)

"October 25th, 1922.
73

Citizens State Bank of St. Paul,
St. Paul, Minnesota.
Gentlemen:

"Your letter of October 24th received this morning and
70 we will, in accordance with our agreements of April 7th and May 10th, resell 20 shares of Baldwin Flour Mills Company, 20 shares of A. J. Kirstin Company, and $3,000 par value or six bonds of the Theopold-Reid Company.

"In accordance with our agreement these securities will be repurchased from you at 97 on or before November 24th, with accrued dividends or interest added to date of repurchase, all in accordance with our original agreements.

Sincerely,

WBF:EC President."

(Original,
Citizens State Bank of Saint Paul letterhead.)

"October 24, 1922.

W. B. Foshay Co.,
826 2nd Ave. So.,
Minneapolis, Minn.
Gentlemen:

"Pursuant to an agreement at the time the following bonds and stock were purchase to the effect that you would repur-

chase said bonds and stocks at any time on thirty days written notice.

"We therefore ask you to repurchase the following stocks and bonds within the time limit:

"20 shares of Baldwin Flour Mills.

"$3,000 Theopold Reed and Co.

"20 shares of A. J. Kirsten Companies.

"The above are par value and prior liens stocks.

Yours truly,

D. D. Clark,
President."

DDC/B

(Original,
W. B. Foshay Co. letter-head.)

"May 10, 1922.
224.119.73

Citizens State Bank,
St. Paul, Minnesota.

Gentlemen:

"Confirming arrangements made with our representative, Mr. E. V. Whiton, by yourself, we hereby contract to take off your hands, at any time after six months on thirty days notice $2,000.00 par value (20 shares) of the A. J. Kirstin Company Prior Lien Stock as evidenced by Certificates No. 277 and 278.

"It is understood that in repurchasing these securities from you we are to pay you 97 and accrued dividends thereon.

Yours very truly,
(signed) Wilbur B. Foshay,
President."

WBF:DF

71

(Printed form)
"Security

Name and Kind	Dated	Maturity	Amounts
Baldwin Flour Mills Pfd. Stock	4/7/22	Apr. 1926	

Numbers	Denomination	Total Par	Price	
40	$100	$2,000	97	$1,940.00

W. B. Foshay Company
Minneapolis

Atlantic 1073-4 529 Second Avenue South

Sold to Citizens State Bank
Address St. Paul, Minn."

(Printed form)
"Security

Name and Kind	Dated	Maturity	Amounts
Theopold-Reid Bonds	4/1/22	Oct. 1926 Apr. 1927	

Denomination	Total Par	Price	
$300.00	$3,000	97	$2,910.00

Date Payable	Interest or Dividends Figured From	Figured to	Days	Per Cent	
4/1 and 10/1	4/1	4/7	6	7	3.50
			Total of Invoice		$2,913.50

W. B. Foshay Company
Minneapolis

Atlantic 1073-4 529 Second Avenue South

Sold to Citizens State Bank,
Address St. Paul, Minn."

(Carbon copy)

"November 24, 1922
73

Citizens State Bank of St. Paul,
St. Paul, Minn.

Attention: Mr. Clark, President

Dear Mr. Clark:

"Confirming our conversation of even date regarding the re-purchase of the following securities which you purchased from us:

"20 shares of Baldwin Flour Mill.

"$3,000 worth of Theopold Reid Co.

"20 shares of A. J. Kirstin Co.

"We have agreed to re-purchase these from you on the 24th, We will, on December 4th, make this re-purchase and we thank you for the extension of time.

Yours very truly,

WEG/EM Vice-President."
72

(Carbon copy)

"January 23, 1923.
176.73

Mr. D. D. Clark,
Citizens State Bank,
St. Paul, Minn.

Dear Mr. Clark:

"As I told you over the phone, we have been unable to get the income that has been derived from the Traymore Apartments since it was first built, and this is very necessary information for us to have in considering the proposition of a bond issue on that property.

"It has also come to our attention that Mr. Reed, an attorney at 745 McKnight Bldg., has a contract entered into with your bank and the Minneapolis National Bank covering this property, and that he is working on a first and second bond issue to take care of the $82,000.00 due your two institutions.

"What are the facts in this connection, and if such a con-

tract exists, is there any sense in our spending any more time on the deal?

Sincerely,

WBF:DC President."

(Carbon copy)

"January 31st, 1923.
176.73

Mr. D. D. Clark,
Citizens State Bank,
St. Paul, Minn.

Dear Mr. Clark:

"Expect to have our investigation of the Traymore Apartments complete, and will decide it at our salesmen's meeting on Friday morning.

"Immediately thereafter I shall be in position to advise you definitely what we can or cannot do in this connection. Am sorry for the delay that has occurred in our reaching a decision, but it is hard for me to decide at once, due to the complications that have existed in connection with the deal, and on top of that, have been tied up in Directors' and Stockholders' meetings in some 12 or 15 companies that I am interested in, so I have not had much spare time to give to anything except these meetings.

Sincerely,

WBF:LR President."

(Carbon copy)

"February 4th, 1923.
176.73

Mr. D. D. Clark,
Citizens State Bank,
St. Paul, Minnesota.

Dear Mr. Clark:

73 "If you care to, I would like to see you in reference to the Traymore Apartment matter, and sometime Wednesday morning would suit me best.

"Wish you would kindly call up my office on receipt of this letter, and we can arrange to get together and go over the matter.

"There is only one way that we could handle it, and it is a matter for you to decide as to whether the same could be handled that way or not.

Sincerely,

WBF*EC President.
Secretary to Mr. Foshay."

(Original,
W. B. Foshay Co. letter-head.)

"June 22, 1923
224.119.73

D. D. Clark, Pres.,
Citizens State Bank,
St. Paul, Minn.
Dear Mr. Clark:

"Your letter dated June 12th reached us on the 14th inst. Since that time our Mr. Whiton has seen you relative to this matter.

"Of course, there is no question about our obligation to take up this 20 shares of A. J. Kirstin prior lien securities covered by certificates #277 and #278 maturing in 1927. However, as this is bringing you a very nice return, and as all payments have been made on this issue both as to yield and maturity promptly when due, we are at a loss to understand why the bank examiner insists on your giving them up.

"Sincerely hope that if you cannot retain these securities you will decide to take some other of our issues maturing on a date satisfactory to you, and will ask Mr. Whiton to see you again about this matter.

"Of course, if you insist on our repurchasing these securities we shall do so in accordance with our understanding, namely, that on or before 30 days from June 12th, we shall have to take them up. You will recollect we took back quite a few securities from you before. We regret to have you take such action, as we feel sure that the retention by you of these securities or the resale of same would not only be profitable but of advantage to yourself and your clients, as they are securities on which you can count on receiving your maturity and yield on the day due, and you can make a nice return on them.

"Wish if you are down town some day you would drop in to see me, and if you can make it about noon-time, we can go to lunch together and discuss this matter.

Sincerely,
(signed) Wilbur B. Foshay,
President."

WBF:DC
74

(Original,
Citizens State Bank of Saint Paul
letter-head.)

"June 12, 1923

W. B. Foshay Co.,
Foshay Building,
Minneapolis, Minn.
Gentlemen:

"In accordance with the arrangement at the time of purchase

of twenty shares of A. J. Kirstin preferred stock, certificate #277 and #278, with par value of $2,000 maturing in 1927, will advise that we want this stock sold within thirty days from this date.

"We had the matter of the sale of these bonds up with you some months ago but after granting two or three extensions the matter went by the board. And the time is now come that we would like to have them sold without further extension.

"Please give this matter your immediate attention and oblige.

Yours very truly,
(signed) D. D. Clark,
President."

DDC/B

(Original,
Citizens State Bank of Saint Paul
letter-head.)

"June 26, 1923

W. B. Foshay Co.,
Foshay Building,
Minneapolis, Minn.

Attention Mr. W. B. Foshay.

Gentlemen:

"Your letter of the 22nd at hand and noted. And, as stated in my letter of the 12th, these bonds should have been taken up some months ago but due to your asking for two or three different extensions the matter was allowed to go by default.

"In this particular transaction I do not believe that strictly speaking you should take advantage of the thirty days' notice. However, we will not split hairs on that, but we must insist that you comply with our request of the 12th.

"And in the future when we are in the market and you are offering the class of securities that we are buying, we certainly will not discriminate against you.

Yours very truly,
D. D. Clark,
President."

DDC/B

Mr. Horowitz: As I understand, counsel admits that G. Arundel or Genevieve Arundel is the same person as the respondent here?

Mr. Ueland: Yes.

Mr. Horowitz: The Government rests.

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75 Mr. Ueland: I repeat what I said this morning. I have not had adequate time to prepare this case, and I would like time to present the respondent's case.

Judge Nordbye: As we have already stated to counsel, Mr.

Ueland has informed the court that he has not had sufficient time to properly prepare his defense, or to investigate the charges made by the Government in the petition, and after a conference we have agreed that the matter may be continued until November 19, at 10 o'clock. I will also state that we have assured Mr. Ueland that the Court is particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary for the defense to properly present such additional facts that the Court should have. The matter now stands adjourned until November 19th, at 10 o'clock.

76 (Minneapolis, Minnesota, November 19, 1931, 10 o'clock A. M.)

Pursuant to adjournment, all parties being present as aforesaid, further proceedings were had at the above time and place as follows:

Mr. Ueland: May it please the Court, in order to shorten this matter, may I be allowed an exception to all adverse rulings?

Judge Nordbye: Yes, that may be understood.

ELIZABETH J. KAASA, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Ueland:

I am principal of the Northrop School. I am acquainted with Mrs. Clark, the respondent in this case. I was in California the first part of this summer, and then I took a trip through the Panama Canal. I was on the water about 28 days and came to New York on the 15th of August. I was in the East for about a week and then came to Columbus, Wisconsin, on the evening of August 23rd. I got back to Minneapolis on the evening of Thursday before school began. I think that was the 3rd day of September.

(Defendant's Exhibits B and B-1 marked for identification by the reporter.)

Exhibit B is a letter that I received from Mrs. Clark. Exhibit B-1 is the envelope in which it was contained. I received this letter in Columbus, Wisconsin, on August 24th.

Mr. Ueland: If the Court please, we offer this letter in evidence for the purpose of showing intent and as having a bearing upon the time when respondent learned she would be called in the Foshay case.

Mr. Horowitz: The letter is objected to on the ground it is

immaterial and a self-serving declaration—having nothing whatever to do with the case; wholly immaterial. The purport of the letter is merely an invitation for her to be here, to
77 be a visitor at her home.

Judge Nordbye: It may be received.

Mr. Horowitz: Exception.

(Defendant's Exhibit B reads, in part as follows:)

"Sunday A. M.

* * * * * * * * * * *

If you can't get your own apt. at the Curtis the first week, why not spend it here, & get one later? * * *

I do want you to know that I would love having you here, for a short time, or a long one. * * *

Will be seeing you soon, and any plans you may make will be more than OKay with me. I have no plans for next week and will make none in the hopes you may decide to be here.

In the meantime,

Much love,

Genevieve."

(Defendant's Exhibit B-1 bears Minneapolis postmark Aug. 23, 1931.)

STEPHEN J. PICHA, a witness called on behalf of the respondent, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Ueland:

I am Chief Deputy United States Marshal. I had general supervision over the matter of mailing out the summonses to people called for jury service in connection with the Foshay case. I am able to state with respect to Mrs. Genevieve Clark as to how her summons was mailed. It was mailed by registered mail. Our office in the usual course of business received back from the postoffice a registered mail receipt.

(Defendant's Exhibit C marked for identification by the reporter.)

Defendant's Exhibit C is the receipt to which I refer. The stamp on the exhibit appears to be placed thereon by the Post-Office Department.

Mr. Ueland: We offer Defendant's Exhibit C in evidence.

The Court: It may be received.

(Defendant's Exhibit C is a registered mail return receipt bearing the postmark at Minneapolis, August 24, 1931, and signed Genevieve A. Clark.)

78 MRS. LOIS BROWN, a witness called on behalf of the respondent, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Ueland:

I am a sister of Mrs. Genevieve Clark. I am employed in the United States Naturalization service. I was employed there in August. I recall in August a telephone call from my sister with respect—or wherein she mentioned the subject of having been called for jury service. I would not be able to fix the date. It would be a few days after she received her notice, because she told me she had just received the jury summons.

She called me up and told me she had been called for jury duty, and I asked her what Court, and she said the Federal Court, and I asked her what time, and she said about the first of September. I asked her if she was glad about it, and she said yes, in one way, but in another way she wished it had been a week or so later, as she was expecting a visitor for the week of the first of September, and she asked if I knew of any way that she could get a postponement or get excused. I said I did not know, but I would try and find out for her if I could. That was all that day of that conversation.

There was another telephone conversation with my sister after that date. I called her. It was a day or so later—perhaps the next day. Well, I told her that I had gone into the clerk's office and told them that she had been called for jury service and asked if she did want a postponement or to be excused, what she would have to do. They suggested that she appear in Court—I told my sister that I had been to the clerk's office, and that that was what I was told, that she should appear in Court that day if she wanted to be excused or to get a postponement. I said also that she might—that they might not reach her name, because there was such a large panel. I told her then that I had heard that it was to be the Foshay case. And that that would probably disqualify
79 her. I think that was all. I said I believed that she should see the Court on the day of the summons. That is all of the conversation that I recall.

Cross Examination.

By Mr. Horowitz:

I work in the Federal Building in St. Paul. I am a sister of Mrs. Clark, the respondent here. After my sister received the notice that she was going to be called for jury service, I talked to her over the telephone. She said she would like to serve on the jury at some time, but she wished she had been called for a week or so later. And that she really would like to serve on a jury.

Then I say I went in to the clerk and made some inquiry about the matter. I saw the chief deputy, Miss Mullane. I

did not ask Miss Mullane to have my sister excused from jury service. I did not ask her that. I did not tell Miss Mullane that my sister was very glad to serve on this jury. I am positive about that. I did not say any other words, to the same effect. I did not say she was glad, or wanted to serve.

Q. Did your sister tell you why she wanted to serve on that jury? A. No, sir.

She said it was a fine experience, that's all, jury service.

After I got this first telephone call from my sister, I spoke to the clerk, Miss Mullane. I telephoned my sister and gave her the information I had learned the same day. I told my sister at that time that it was going to be the Foshay case that she was going to sit on.

That could not have been over three or four days before September 1st. I can't fix the day. When I told my sister that she was going to sit on the Foshay case, and that she was called for the Foshay case, and that that would probably disqualify her, I meant by that because she had worked
80 there. I told my sister because of the matter of her employment there, that that would naturally disqualify her. She said it probably would, I believe. When I said it would probably disqualify her, I told her, why, I thought it would probably disqualify her.

I did not discuss the Foshay Company over the telephone. I knew my sister had been employed here. I do not know Mrs. O'Hearn. I do not know Mrs. Mabry.

Judge Sanborn: By the way, Mrs. Brown, do either you or your sister have any other relatives working in the Federal Building in St. Paul?

The Witness: No, we have not, your Honor.

MRS. GENEVIEVE A. CLARK, the respondent, being first duly sworn in her own behalf, testified as follows:

Direct Examination.

By Mr. Ueland:

I am Mrs. Genevieve A. Clark. I am married. My husband is D. D. Clark. I live at 4641 17th avenue south. Yes, I have two children. I was a juror in the Foshay case. That was my first experience as a juror.

Exhibits B and B-1 is a letter I wrote to Miss Kaasa. I wrote that letter on Sunday, the 23rd of August.

That is my signature on Defendant's Exhibit C. Well, I had a notice from the Post Office Department saying that there was a registered letter at the Bloomington and Lake Station, and for me to call for it, and I did not get around to call for it for two or three days, and then another notice came, saying that

it was the second notice, and to please call, and so I went down there either that day or the next day—I am not sure which—and picked it up. I found that it was a summons for jury duty. At that time I signed this exhibit.

Before I received the summons I did not know what the registered mail notice, or the notice in the postoffice, had
81 reference to. I did not know before I signed that receipt that I was summoned for jury service. I did not expect to be summoned for jury service before that time.

After I received this summons I had a telephone conversation with my sister, Mrs. Brown. Well, I don't know whether it was the next day, or whether it was not for two or three days after. It was shortly after I received it. Well, I told her that I had received a summons for jury duty. She asked me in what court, and I told her the Federal Court. She asked me if I was glad to receive such a summons, and I told her yes I would be glad to have jury experience, but that I was sorry it had come at just this time; that I was sort of half way expecting a guest to be with me during that first week, the week of September 1st, and I would like to be free at that time. I think I said at that time that I believed I would ask my husband whether it was possible to get a postponement. I think that that was the extent of that conversation.

Then I had a subsequent telephone conversation with my sister, Mrs. Brown. I don't know just when it was, but it was after I had called her—perhaps a day or two later. She called me up, and said that she had just stepped into the clerk's office, and had been talking to one of the girls there, and had asked her, if I should want a postponement or an exemption, what would be the proper procedure, and she told me that in the case I did want such a thing, I would have to see one of the judges, but she said that the girl had told her that there was a large panel called; therefore the chances were very small that I would be drawn on it, and that I might just as well appear that day, because that would probably be the only time I would have to appear, and she told me that the girl had told her that it was the Foshay case that I was called on, and I think that that was the extent of that conversation.

When I went to the court house as a juror, I was examined by Judge Molyneaux as to my qualifications as a juror.

Q. What other experience in court had you had prior
82 to that time?

A. Well, I had been in traffic court twice—that's all.

Q. What was your mental condition at the time of your examination? A. Well, I was extremely nervous.

I remember Mr. Ackerman, the reporter, taking down my answers. Well, the only thing he said to me was to speak

louder. He did say that several times, that he could not hear my remarks. I think I do not remember anything else about Mr. Ackerman's conduct or behavior during that examination. I did not know at that time that my husband had formed an association, a business association, with a man named Mr. Willie. At that time I had never seen Defendant's Exhibit A. At that time I had never heard of the business name of Willie & Clark being used.

Q. It appears by Government's Exhibit 2, Mrs. Clark, that Judge Molyneaux asked you this question with respect to your husband: "Q. Does he have an office?" and it appears that you answered, "A. Yes, sir," and it then appears that the next question by Judge Molyneaux was, "Q. Where?" and that your answer was, "A. 417 South Fourth Street." Did you so answer? A. No, I said 407 South Fourth Street.

Q. Had your husband had an office at 407 South Fourth Street?

A. Yes, he had for three years or more.

I did not know at the time of that answer that he had given up that office.

Q. It appears from Government's Exhibit 2, that you told the Court, Judge Molyneaux, that your husband had been in the real estate business for about five years, and it then appears that Judge Molyneaux asked you this question: "Q. Was he in some business before that?" and it appears by this exhibit, prepared by Mr. Ackerman, that your answer was, "Well, we were out of the city for two years, when he was not doing anything. Before that he was in the real estate and insurance business." What is your recollection as to whether that is a true and correct statement of your answer?

83 A. Well, when I was asked that question I answered that his business before that was real estate, insurance and banking.

When I used the words, "real estate and insurance" in connection with my husband's business, I referred to the real estate and the insurance departments that were in connection with the bank, the Citizens State Bank of St. Paul. That bank had a real estate and an insurance department.

At the time of this examination, I did not intend to conceal from Judge Molyneaux that my husband had been in the banking business.

Q. I think it has appeared in evidence here, Mrs. Clark, at least there is some inference, to the effect that your husband was requested to resign as president of the Citizens State Bank of St. Paul by the commissioner of banking, or the Banking Department—I have forgotten which. Did you know that on September 1st, 1931?

A. No, I did not.

Before I was married I was a stenographer, working for the Citizens State Bank. Well, I had charge of the—I had charge of the insurance department. I did all the stenographic work, and occasionally during rush hours I would help in the teller's cage. I did all the stenographic work.

I was married in January, 1921.

Well, that title of assistant cashier was given me just so I would have the authority to sign cashier's checks and bank drafts during the absence from the bank of the other officers that were qualified to sign. That was the only way I used that title at all. The greater proportion of my work was stenographic work.

Q. Now, it appears from this Government's Exhibit 2 that you were asked this question: "Q. In what kind of business did you work?" and it appears that you answered, "A. Well, I did some banking, and some real estate and insurance—" and you went on to say something about some automobile concern. When you referred to, or when you said, "some
84 real estate and insurance," what work did you refer to?

A. The work I had done in the bank, in the real estate and in the insurance department.

After my marriage I continued to do work in the bank for a few months. I wasn't there all the time—just part of each day—short hours, and not always every day. I ceased to work there altogether in August, the first part of August, 1921. The reason for my leaving the bank was that I became ill at that time. I became pregnant.

Q. Now, Mrs. Clark, I will ask you to read over the Exhibit 2, Government's Exhibit 2. (Government's Exhibit 2 handed to witness.) Did you understand Judge Molyneaux to ask you in this examination, whether you had ever been employed since your marriage?

A. No, he did not ask me that question.

I was at one time employed at the Foshay Company. I was sent over there from an employment agency. Well, I was told to report to a girl—I have forgotten her name, but I think it was Miss Dahl, and I went to her. She employed me, and assigned me to a desk, and a typewriter to do temporary typing, and it was in a room where there were perhaps 20 or 30 other girls. I took my place at the desk, and was given work to copy. That was the only work that I had during the entire time I was there, just copying work. My employment lasted about ten days.

What was the reason of my leaving? Well, the last day or two that I was there, I was sent to another girl, a Miss Priese. I do not remember just what my work was there,

but as I remember it, it was sorting papers, and after I had been there for a day or two, she said that she did not need me in that department any longer, and to report back to Miss Dahl the next morning, but I did not go back to her. I telephoned her, or wrote her a note—I don't remember which—and told her that I was not going to be there any more.

85 I remember on September 1st, before I was examined for jury service, talking to Mrs. Bessie Johnson. I don't remember that conversation. It was mostly on general subjects, and on the procedure that was taking place here in the court room.

Q. What is your recollection as to whether you discussed with Mrs. Johnson your employment at the Foshay Company?

A. I have no recollection of making that statement to Mrs. Johnson.

Well, I remember Mrs. Johnson told me about her health, and about her garden. I don't remember anything else. Mrs. Johnson was not familiar with the city, and did not know where to go to get into the shopping district, and I told her I would be glad to show her, as I was going over on Nicollet, and I took her over that far, and pointed out to her where to go. I walked over with her to Nicollet avenue from the building here.

Q. Do you recall a conversation before you were examined as a prospective juror, with Mrs. Irene Passer?

A. I remember she was sitting in the group with us. We were all talking together there.

The conversation was general amongst us all, the same thing, what was happening here in the court room, and as I say, gardening, and we discussed Mrs. Passer's home town of Olivia, and Redwood Falls. I told her we went through Olivia, and we often got up to Redwood Falls.

Q. Do you remember telling Mrs. Passer that you had worked at the Foshay Building?

A. No, I have no recollection of making that statement at all.

Q. Did you tell Mrs. Passer that you were praying to get on the jury in the Foshay case, or words to that effect?

A. I absolutely did not. I am positive of that.

Q. Did you tell Mrs. Passer that you had a special interest in the case, or a very special interest in the case?

A. I did not, absolutely.

Q. As a matter of fact, did you have a special interest
86 in the case? A. No, I did not.

Q. Did you tell Mrs. Passer that you had been informed for two weeks that you would be called as a juror in the Foshay case? A. No, I did not.

Q. Now, Mrs. Clark, after your examination by Judge Molyneaux, when did the fact that you had worked at the Foshay Company first come to your mind?

A. Well, I began thinking of it that evening at the hotel. I thought of it quite seriously and wondered if it were the thing to do to get up the next day in court and tell Judge Molyneaux, but I went over and over it. I thought of the short time I had been there, the few days I had been there, and in such a minor position, and because of the fact that I had never seen or talked to or met any of the defendants, I didn't believe that it was important, and so I finally decided to say nothing about it. I couldn't see that it made any difference.

At the time I was called or was examined by Judge Molyneaux, I absolutely did not know any of the defendants in the Foshay case. I never did know that my husband or my husband's bank had transacted business with Mr. Foshay or Mr. Foshay's company. I did not know that my husband was acquainted with Mr. Mabry. I did not know that Mr. Mabry had been a customer of the Citizens State Bank.

Q. It appears by this transcript of your answers to Judge Molyneaux's questions, that you were asked this question: "Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?" And it appears that you answered: "A. Yes, I do feel that way." Was that your answer as you recall it?

A. Yes, sir.

Q. Was that answer true?

A. Yes, it was.

Q. Were you conscious at the time that you made that answer of any bias, either one way or the other, in the Foshay case? A. No, I had no bias.

87 Q. It appears that you were then asked this question: "Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?" And it appears that you answered that: "A. Yes, I do." Was that your answer?

A. Yes, as I remember it, that is correct.

Q. And state whether or not at the time you made that answer you did think you could follow the evidence?

A. Yes, I did.

Q. And state whether or not you did think you would try to follow the evidence? A. Yes, I did.

Q. And state whether or not you thought you would base your judgment on that and the law as given to you by the Court? A. Yes, I did.

Q. Now, Mrs. Clark, did you at any time during the course of Judge Molyneaux's examination, intend in any way to mislead the Court? A. No, I certainly did not.

Cross Examination.

By Mr. Horowitz:

I wrote this letter, Exhibits B and B-1, on Sunday morning, and Mrs. Kaasa told me that she had looked the matter up, and that that was the 23rd. No, I did not get a reply to that letter. I had had one just before that. I had written her a previous invitation to that and sent it on to New York, and I had a letter from her answering that, saying that she was not sure of her plans, but that if it were possible for her to come, she would wire me, or call me up, or write me or call me up, and then this letter followed that acknowledgment. I did not send out any other letter or telegram to her, finding out what her plans were, definitely. And she did not send me any wire or telegram. That one letter she wrote is the only one she wrote saying if it were possible for her to come a few days in advance, she would do so, and she would
88 let me know to that effect. At the time I received that other letter, when I sent this letter, I did not have any definite knowledge that she would accept my invitation to spend some days at my house. No definite acceptance, no.

When I talked to my sister, Mrs. Brown, over the telephone some days before the first of September, she told me that I was going to sit or was called for jury duty in the Foshay case. I knew that two or three days in advance, yes. I knew on the morning of September 1st, that I was called in connection with the Foshay case.

Q. And at the time you had the conversation with Mrs. Passer and Mrs. Passer asked you the question, "How did you know that you were going to be called on the Foshay case because my summons said nothing about it," did you tell her how you happened to know that?

A. I do not remember having that conversation with Mrs. Passer.

I would not say that I did not have such a conversation. I don't think I mentioned the fact to Mrs. Passer that I had a cousin or a relative or somebody working in the Federal Building in St. Paul, and that I got the information from such relative. I have no cousin over there. I have a sister. I don't think I mentioned it to her. I don't think I mentioned the fact that I have a sister or a relative over there.

Q. Do you remember the afternoon that Mr. Simmons, Mr. Hugdal, Mr. Shriver, Hugo Ackerman, the reporter, and I

called at your house, and asked you and Mr. Clark some questions? A. Yes, I do.

Q. I will ask you if it isn't a fact—I will ask you if it isn't a fact that you stated in answer to a question put to you by me: "A. No, he did not, absolutely not; in fact, I did not know that it was the Foshay jury that I was called for; I did not know that until I got down into the court room."

89 Do you remember stating that to all of us present that afternoon?

A. I suppose I did if it is in the record, but I would like to say why I did state that. Yes, I must have if it is down in the record, and I would like to give my explanation of why I did it. My purpose in stating that was that I thought I was protecting someone who had given out information from the clerk's office that should not have been giving out that information, and I was attempting to shield her, realizing perhaps I would hurt myself in doing it, but that was my purpose in doing it. Perhaps she should have given that information, but I didn't know whether she should have or not, but I was attempting to shield her.

Q. Are you not attempting to shield anybody now?

A. No, I am telling the truth.

Q. And isn't it a fact that at that same time you said: "And I got my call, my letter, so I went down there, and I figured it was just going to be one of the bootlegging cases; that is what I thought I would be called on."

A. Yes, that was my first idea of what I was being called on, and until I found out what it was after several days.

Q. Well, you didn't think that on the morning you were here in the court room on September 1st, 1931, did you?

A. No.

Q. Well, now, when we were out there at your home that afternoon, you knew, did you not, at that time, that I stated that you were being accused of giving perjured testimony at the time Judge Molyneaux was examining you?

A. You didn't say anything about that, I don't believe. I don't remember whether you did or not.

90 Q. I will ask you if it is not a fact that the following took place, from the time that we first entered your house; "Mr. Horowitz: I want to tell you very frankly that our purpose here is to say to you, that when the Court examined you, Mrs. Clark, as to the competency of you as a juror, that you did not testify truthfully," and that you then interrupted and said, "Oh, yes, I did, Mr. Horowitz," and I continued and I said, "And I will go into that a little bit." And that I further went on to say: "And that being the case, I feel that it is a very serious matter, and the thing that I want you to do is to decide

whether you and Mr. Clark would care to answer such questions as we would put to you, in an attempt to explain, if you can, the answers that you made to the Court. Now, the situation frankly is that you don't have to talk with us at all." Do you remember that conversation, Mrs. Clark? A. Yes.

Q. And that Mr. Clark then interrupted and said, "Well, Mr. Horowitz, you understand that we have nothing to conceal, but first, we would like to know the questions and answers, of course." Do you remember Mr. Clark stating that?

A. I think so.

Q. And that I then continued, "Well, I would just start, and just ask you questions, and if you want to—I would want to interrogate you generally; I am not going to say, 'Did you testify thus and so' or 'was it true or false?' We don't do things in that way. But what I would do would be to go into the subject-matters that embraced the answers that you gave, and if, at any time in the course of the examination, you don't want to go ahead with it, it is up to you—it is up to both of you, you see, and, frankly, unless you can convince us
91 that the information that we have got is not correct, we are going to be obliged to take some action which would be very drastic, and very unpleasant; so that you understand, there is no compulsion; you don't have to answer any question; you can say, "'Well, we don't care to discuss it' and we will just leave you, and that is the end of the matter; so it is a matter for you to determine whether both of you care to do that." Do you remember my stating that?

A. I remember the substance of it, yes.

Q. And that is correct, the substance of it? A. I think so.

Q. And then Mr. Clark said—with all of those men present: "Of course we will determine that when we hear the questions; we could not do that before. We are perfectly open and frank to answer anything, providing it is a straight-forward question." Do you remember your husband stating that?

A. I think so.

Q. And then I answered, "Well, that is the only kind that we intend to ask," and Mr. Clark replied, "Well, with that understanding, you go ahead—shoot." Do you remember that?

A. I think so.

(Government's Exhibit 13 marked for identification by the reporter.)

Government's Exhibit 13 is a printed form.

I don't remember if the summons for jury service that I received through registered mail, was on a printed form just like that, but I think so. It looks the same. My attention is called to this printed form, which contains the typewriting at the lower left-hand corner, the following: "Mail excuses and claims

of exemption to Joel M. Dickey, Clerk, U. S. District Court, St. Paul, Minnesota." I don't remember that mine had that same memorandum on there, in typewriting. It probably did, but I don't remember. My attention is called to the bottom of this notice, where it refers to special notice. I don't know whether I read that all through or not. I suppose it did
92 say "Special Notice" at the time.

A. Well, I don't remember whether I read it or not. No, I don't think I said I was eager to be excused from that jury service. I don't think that was my statement. I wanted to have it postponed. Well, as I said, I would like jury experience, at some time, but I did not want it at that time. I think I made that remark to my sister.

Q. Well, now, I will ask you this, if you did not likewise make the following answers at your home on the afternoon of November 3, 1931: "Q. When you were waiting there, not knowing whether your name would be drawn or not, did you have any discussion with any other prospective jurors, about the possibility of your acting on the case?" "A. No, I don't believe so." Did you so state in answer to the question that I put to you then?

A. I imagine I did if it is down there. I don't remember what I said.

Q. And I asked you then: "Q. Were you very eager to get on that case?" "A. No, I was not." "Q. You were not?" "A. No, I was not." "Q. Did you want to get on this jury?" "A. I should say I did not; in fact, I did not want to get on any jury." "Q. You did not want to get on this jury for the purpose of earning the money?" "A. No, I did not; absolutely not—as badly as we needed the money." "Q. Do you remember telling one of the prospective jurors that you were afraid that you would be disqualified because you had worked up in the Tower?" "A. I did not tell anybody that at all." "Q. You did not tell anybody that?" "A. Absolutely not." "Q. Do you remember telling anybody that you prayed every minute that you would get on this jury?" "A. I should say I do not. After what I said at home, about not wanting to be on the jury, that is rather funny." Do you remember those questions being put to you, and these answers being made by you?
93 A. Some of them, yes.

Q. Were you trying to shield anybody at that time?

A. No.

Q. What did you mean when you said, "After what I said at home, about not wanting to be on the jury, that is rather funny"?

A. I meant just that. I had not wanted to get on the jury.

I had wanted to be free that week, absolutely free.

Q. Now, at the time you talked with Mrs. Passer, and with Mrs. Johnson, you had already had a discussion with your sister about your being disqualified because you had worked for the Foshay Company?

A. No, I don't think I had. I don't remember her telling me that at all. She has testified to that, but I don't remember that.

I say I have no recollection of making that statement that I didn't know, or I believed I would be disqualified because I worked in the Tower, to Mrs. Passer or anyone else. I have already testified that I do not remember having a conversation with Mrs. Johnson in which in substance I said I believed I would be disqualified because I worked in the Foshay Tower.

Q. Now, in the course of that day's hearing, do you remember saying to Mrs. Matilda Anderson of Mankato, in the course of that day—

A. I don't know who Mrs. Matilda Anderson is.

Q. She is the third lady in the front row over there (indicating in court room.) Another prospective juror in the Foshay case.

A. Well, if she was the one that was drawn first—that is the only way I could place her. I don't know whether she was or not.

Q. Yes, she was drawn first. Do you remember talking to her?

Mr. Ueland: This is objected to as not proper cross examination. I would like to be heard on that objection.

94 Judge Nordbye: Oh, I don't think we will just go by the rules of evidence, Mr. Ueland, which we recognize in ordinary matters. Objection overruled.

Mr. Ueland: Exception.

Q. (Continued.) Do you remember having a conversation with Mrs. Anderson that afternoon of September 1st?

A. I don't know whether Mrs. Anderson was present during the time we were talking or not.

Q. Well, do you remember of having a conversation with Mrs. Anderson, you and Mrs. Anderson?

A. I don't remember whether she was with us when we were talking or not.

Q. No, this is an independent conversation, one that you had with Mrs. Anderson yourself.

Mr. Ueland: May my objection stand to all the conversation with Mrs. Anderson?

Judge Nordbye: It may be so understood.

A. I don't remember whether I talked to her alone or not.

Q. Well, now, is it not a fact that you also told Mrs. Ander-

son as well as Mrs. Johnson and Mrs. Passer that you believed that you would be disqualified from jury service because you worked in the Foshay Tower?

Mr. Ueland: Objected to as stating something not in evidence.

Judge Nordbye: She may answer.

Mr. Ueland: Exception.

A. I have no recollection of making that statement to anyone.

Q. And is it not a fact that you further told her that you were very eager to serve on this particular jury?

A. No, I know I did not tell anyone that.

Q. You know you did not tell anyone that?

A. Absolutely not.

During the time that I was being examined for a juror, the fact that I had worked for the Foshay Company never
95 came into my mind. I was thinking of the judge's questions, and trying to answer them. During the evening I first began to think of it as having any bearing on the fact that I had been chosen as a juror and wondering what effect it would have, and that was when I first began thinking about it seriously.

I did not mention that fact to Mrs. Henderson. I did not mention it to the Court or the judge. I did not mention it to any of the other jurors.

I worked for the W. B. Foshay Company, that was during July of 1929.

Q. And during the time that you were working for the W. B. Foshay Company, you remember that your husband came there, came to the Foshay Building every noon and every evening?

A. He didn't come there every noon, but he was usually there at night, down in front, in the car, waiting to pick me up in the car at 5 o'clock. Usually I had lunch with him, but he did not come to the building. We generally met where we were going to have lunch. That was arranged. I knew that I was working for the W. B. Foshay Company at that time.

Q. When we first talked to you about that, you were not sure whether you were working for the W. B. Foshay Company, were you?

A. Yes, I was. When we talked out at the house you mean?

Q. At first you were not sure that you were working for the W. B. Foshay Company at all?

A. When I first got up to the building I was not sure of that, but I knew it before I had been there very long.

Q. Do you remember my asking you these questions:

"Q. And for how long a time did you work?

"A. Well, I worked—I don't think I did any real work until 1929, did I (addressing question to Mr. Clark).

"Q. (By Mr. Horowitz.) Until 1929?

96 "A. No, I don't think so.

"Q. And for whom did you work in 1929?

"A. I worked—I worked for a public stenographer, and I worked for my husband during that time, and I worked for about two or three weeks in the Tower—I suppose that is what you have in mind?

"Q. That is it, in part, yes.

"A. Well, I did; I was there for about two or three weeks.

"Q. When you say that you were two or three weeks in the Tower, you mean that you were employed by the W. B. Foshay Company?

"A. Well, I am not sure."

Q. Do you remember so stating to us at your home on the afternoon of November 3rd?

A. I don't remember whether those were my words or not. I suppose they were, if they are down there.

Q. And that later you decided that you had a pretty good idea that you were working for the W. B. Foshay Company?

A. I knew that I was working for the W. B. Foshay Company. How often did my husband visit me there, or meet me at lunch? Well, I have no way of remembering that definitely. We had lunch together several times during the time that I was employed there. I was introduced to some of the other girls there. I don't remember how frequently I had lunch with my husband.

Q. Well, is it not a fact that in answer to a question put by me, you made the following answer:

"Q. Did you ever talk to any of the other stenographers that were employed there?

"A. Well, no, I did not. When work was over in the evening, I would just get my wraps right on, and go down-

97 stairs, because Mr. Clark was usually waiting for me down there, so I did not linger around, and I generally had lunch with him at noon, so I did not talk with the girls there, you see; I came right down-stairs and met Mr. Clark, and we would go for lunch, and I would come back when it was time to be at work again."

A. That is very true.

Q. Now, did Mr. Clark tell you at the time that he called for you or met you at noon, or called for you in the evening, that he had business transactions with the W. B. Foshay Company when he was president of the Citizens State Bank at St. Paul?

Mr. Ueland: Objected to as not proper cross examination.

Communications between husband and wife should not be gone into.

Judge Nordbye: Objection overruled.

A. He never did mention it, no.

I was married in 1921. About January of that year. At the time that I was married I had been working for the Citizens State Bank of St. Paul for a period of about three years. I think that is about right. My remembrance is that I went there in July, 1918. I am not sure of that. The Citizens State Bank of St. Paul is located at Selby and Dale.

At the time I went to work at the bank, Mr. Clark, my husband, was president of the bank. Well, I don't remember how many employees the bank had. At that time I would say five or six. That would be the best of my recollection. I don't remember. I don't think I know when that bank was first organized. At all events my husband was president of that bank at the time I started working for the bank. And continued to be president of it until sometime in 1925. As president of the bank, he was in charge of the bank.

98 There were five or six employees at that time. When I first went in that was my remembrance, although I am not sure. At the time I was married in 1921, how many employees were there at the bank? I would say about the same. I am not sure.

Well, there was a cashier and two or three bookkeepers, and there may have been four—I am not sure of that—and there was another girl. She helped me with the stenographic work. During the last few months I was there, she was doing half of my work. Well, there was the cashier, and I think two of the boys that were in the bank were in the teller's cage, when they were needed. But usually there was the one cashier and one boy, as I remember. And he would also do some bookkeeping. I think there were two other boys that did bookkeeping all the time.

Q. Now, you were talking about the real estate department at the bank. Just what kind of a department was that?

A. I don't know what you mean. It was the real estate department, where they handled real estate loans, or I mean sales, real estate sales.

I don't know how the real estate was sold. I suppose the bank was selling the bank's real estate. I don't know. Well, Mr. Clark sold properties for the customers. He had charge of several apartment buildings, store buildings, took care of the rentals of them. Well, it was part of the business. I think the bank made loans on real estate. I am not sure of that.

Q. Now, what did he do with respect to the insurance department?

A. Well, it was—they had the agency for several different insurance companies, writing fire insurance policies on properties all over the city.

Q. Now, you were the one that handled that, didn't you?

A. Yes, I wrote all the insurance.

I did not know that my husband had had some difficulty with the bank examiner in 1925.

99 On the morning that I appeared for jury service on September 1st, 1931, I remember being at the office of Willie & Clark, at 519 Palace Building in Minneapolis. We stopped there for a minute. I did not know at that time that Mr. Clark had an office at 519 Palace Building. I know that he went there frequently. Yes, I knew there were business relations pending between him and Mr. Willie.

Q. Did you know that your husband had some land, or was interested in some land, at Presidio, Texas?

A. Well, I knew that that was what the relationship was going to be about when it was formed between him and Mr. Willie.

I knew he had been going in there all during the summer, but I don't think he has had an office there. If he has, I have not known anything about it. He was building manager at 407-417 South 4th street. Well, the building was sold. I don't know when the building was sold. I don't remember. I know that the sale took place sometime during the summer, yes. No, he kept his office there. I mean that if I wanted to reach him from that time on, that I would telephone to that old building at 407 South 4th street. Absolutely. He had his business there, and he had his office there and continued to stay there after he was not building manager any more. I don't know how long after that. I thought he still had it. I thought he still had it the day I went up there the first day of September, up to Mr. Willie's office.

Q. On September 1st, when you were selected as a juror in the Foshay case, didn't you ask Mrs. Henderson to telephone your husband at 519 Palace Building?

A. I think she telephoned him that day at home, although I am not sure. I don't remember whether I gave her the telephone number at 519 Palace Building.

Q. Do you remember at that time when the Shrine Conclave, or one of the fraternal orders, had a parade in Minneapolis in August of 1931 going up to your husband's

100 office at 519 Palace Building with your children, so that you could have a better place from which you could see the parade? A. No, I went up to Mr. Willie's office.

Q. Mr. Willie's office is divided into four rooms, and do you remember that one of those rooms was occupied by Mr. Clark?

A. It is now, but it was not then. At least it was not to my knowledge. I called his old office at 407 South 4th street many times, and I was told that Mr. Clark was not there, but I could get him probably at Geneva 3966. I know Geneva 3966 was 519 Palace Building.

I don't know definitely that he is connected with the sale of lands at Presidio, Texas, yet. I don't know that he has any definite interest there. I know it is pending.

I had met Miss Alice B. Todd up at the office. I never discussed with Miss Todd at any time the Kansas City Land Bank case or the so called Craven case. I never discussed with Miss Todd any lawsuit, civil or criminal. I never discussed with Miss Todd myself, C. W. Cobel, one of the witnesses in the Foshay case.

When I went with my husband to 519 Palace Building on September 1st, 1931, we started down to the Federal Building. He was going to go up with me, and when we got down there he said, "Let's go up. I want to see Mr. Willie for a minute," and we went up there, and I was introduced to Mr. Willie the first time that day, the first time that I had ever seen him or met him. Yes, I had met Miss Todd before. I had been in the office two or three times.

Q. Now, when the Court asked you this question: "Q. Have you yourself ever been in any business of any kind?" your answer was: "A. I have been a stenographer before my marriage, yes." You so testified? A. Yes.

Q. And by that you intended to convey the idea that you had not been employed after your marriage?

A. No, that was the only—I had in mind at that time that I was conveying the idea that that was the only employ-
101 ment I have ever had of any length, because all the employment that I had had after my marriage lasted only two or three days or a couple of weeks at the most.

Q. Well, you told Judge Molyneaux that when he asked you the question, whether you yourself had ever been in any business of any kind?

A. Is that the way the question is worded?

Q. Yes; "Have you yourself ever been in any business of any kind?" And your answer was: "A. I have been a stenographer before my marriage, yes."

A. I had no intention of impressing the word "before."

Q. Did you know that you were using the word "before"?

A. I suppose I did.

Q. Then Judge Molyneaux asked you: "Q. In what kind of business did you work?" and your answer was, "A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency." Do

you remember so answering? A. Yes.

Q. Well, now, how long had you been employed at the Nash agency?

A. Well, not for any length of time. That was for a brief period.

Q. In fact, it was only for just a few days altogether?

A. Well, it was probably longer than that, but not more than a couple of weeks.

That was before I worked for the W. B. Foshay Company. That was during the time that I testified that my husband and I were down south. That was sometime in 1926 or 1927; I don't remember which. I remember that when my husband resigned as president of the bank, my husband and I went down to Florida. We were down there about a year and a half or two years. It was during that time that I was working for the Nash agency. I remembered that particular employment, although it did not last more than two weeks. I testified about that employment.

102 Q. And isn't it a fact, Mrs. Clark, that the reason you did not testify about your Foshay employment, was because you were determined to sit on that jury if it was possible for you to give answers that would be deceiving?

A. No, that is not so.

That employment for the Nash agency was after my marriage. I worked for a public stenographer after I was married. As late as 1929 I was working for a public stenographer, a Miss Singler.

Q. Now, Mrs. Clark, I will ask you if during the first week of the trial of the Foshay case, in the corridor, right outside of this court room, or in the hall outside of this court room, you did not say to Mr. Peterson and Mr. Farber, jurors in the Foshay case, that you believed that Foshay was a victim of circumstances? A. I don't remember making that remark.

Q. Would you say you did not make any such remark?

A. No.

Q. Do you remember—isn't it a fact that you further stated to Mr. Farber at the same time, and to Mr. Peterson at the same time, and in the same place, that Mr. Foshay had gone to New York to arrange for an $18,000,000.00 loan; that he had made all arrangements for it, and then the crash came, and he came back without a dollar. Do you remember so telling Mr. Farber and Mr. Peterson?

A. Not as you mentioned it to me, no. I said it was common talk around Minneapolis at that time, that I had heard it. Those were my words that I used to them.

Q. Well, did you couple that up with the statement that Mr. Foshay was a victim of circumstances.

A. I don't think so.

Q. Did you have that in mind when the Court was questioning you as to whether you had any knowledge or information about the Foshay case? A. No, I did not.

103 Q. Well, what was your object then in telling those jurors that you believed, during the first week of the trial, that Foshay was a victim of circumstances?

A. I said I don't think I made that remark.

Q. Well, do you remember later in the jury room, when Mr. Farber confronted you with that statement that you had made during the first week of the trial, that you told him you thought he would have better sense than to tell that to the Court? Do you remember stating that to Mr. Farber?

Mr. Ueland: Objected to as not proper cross examination, violating the privileges of the witness—irrelevant and immaterial.

Judge Nordbye: She may answer.

Mr. Ueland: Exception.

A. I don't remember making that remark.

Q. Would you say that you did not make such a remark?

A. No.

Q. Previous to September 1st, 1931, did you ever talk to your husband about the so-called Kansas City Land Bank—the Kansas City Joint Land Bank case, the criminal case?

A. I never heard of it at all.

I never heard of the connection of a man by the name of Craven with that case. I never heard of the man's name at all. I did not know that Miss Todd, Alice B. Todd, who testified in this case, was secretary of that concern and was employed in connection with Mr. Craven. I never discussed with my husband before September 1st, 1931, Mr. C. W. Cobel. After September 1, 1931, after I was chosen as a juror, I did not discuss with my husband, Mr. C. W. Cobel, one of the witnesses in that case. His name was never mentioned at all.

Q. Well, where did you get the information upon which you based the statement to the other jurors that you would like to choke Mr. Clark, or Mr. Cobel I mean, by reason of

104 some testimony that he had given in a case down south?

Mr. Ueland: Objected to as improper cross examination, not gone into in the examination on direct—violating the privileges of a juror.

Judge Nordbye: Well, she may be asked whether she did make that statement first.

Q. Well, Mrs. Clark, I will ask you to state if it is not a fact that you stated to some of the jurors, during the time of your deliberations, that you would like to choke Mr. Cobel?

A. Not in just that way, no, I did not.

Mr. Ueland: May I have the same objection to this line of questioning?

Judge Nordbye: It may be so understood.

Q. Well, did you discuss—did you make any mention of the fact to the other jurors during the time of your deliberations, that Mr. Cobel had testified falsely in some case down south?

A. No, I did not—not in that way. Well, I said that I had years ago heard of a case where a witness had testified and made a case appear black, and that I was wondering whether the two witnesses were not the same. It was merely a case of thinking out loud, that is all—that I wondered if the two witnesses had not been the same.

Q. Did you state to the jurors that this man's wife, against whom Cobel had testified, had died, and the son had gotten T. B., and when the son died, that he said he was coming up to kill Cobel? A. No, I don't think so.

Q. Would you say that you did not make such a statement?

A. Yes, I think I would. I don't think I made any such statement as you are making.

Q. Now, what case was it, in that connection, where you wondered whether it was the same witness or not?

A. No case at all, except that I had heard of this man years ago, but that had not made any impression on me at all. It was just hearsay.

105 Q. What man had you heard of?

A. I don't remember now.

Q. You don't remember the man? A. No.

Q. Do you remember the case? A. No.

Q. Do you remember the witness who testified?

A. No, I do not.

Q. You just happened to think that at some time in the past, in your miscellaneous newspaper reading, you had heard of some witness who testified in some case, some accountant, who had made black appear something else, and you wondered out loud whether that was Mr. Cobel?

A. That was about what it amounts to, yes. I simply told it in the heat of battle, for the sake of argument, that's all.

Q. Well, did you say you would like to choke Mr. Cobel?

A. I made the remark, when we were discussing Mr. Cobel and his testimony in the jury room. I made the remark that during Mr. Brill's cross examination of him, his constant and continual evasion made me so restless that I could have throttled him. That was my exact words.

Q. You remember that exactly, do you? A. Yes.

Q. Do you remember exactly what you said to Mrs. Passer?

A. No, I do not.

Q. Do you remember exactly what you said to Mrs. Johnson? A. No, I do not.

Q. Do you remember exactly what you said to Mrs. Matilda Anderson? A. No.

Q. Well, now, your husband visited you during the trial?

A. Yes.

Mr. Ueland: Same objection, your Honor.

Judge Nordbye: The same ruling.

He visited me I would say about once a week. He would usually come on Sunday. I would talk to him on the mezzanine floor, at the Andrews Hotel. The rooms of the jurors
106 opened onto the mezzanine floor in that building. I remember on the mezzanine floor there is a typewriter desk where the public stenographer works. My husband and I would talk at the rear of the desk, I think. There were chairs placed along the side of the desk, as I remember it. At that time there was a radio on the mezzanine. Not always—it was only there for football games. There was a sort of a davenport or sofa or a settee there. I don't know how far that would be, but it is not very far from the desk. Well, I would say about as far from me to Mr. Rensch (indicating about 20 feet). Well, I don't remember, Mr. Horowitz. I do not have a clear mental picture of that at all.

Mrs. Henderson during those times was with us. Well, as a rule, we occupied the settee and she sat on a chair beside us. I remember that Judge Molyneaux completed his charge about one o'clock or thereabouts, on a Friday. I don't remember whether Mr. Clark visited me the preceding Sunday. I suppose he did. I don't remember that he called—that he visited me there about noon time or luncheon time.

Q. And isn't it a fact further that on that Sunday, that Mr. Clark was talking to you at the settee, and that Mrs. Henderson was talking to the public stenographer some 30 or 40 feet away?

A. Well, I don't believe so. I don't believe Mrs. Henderson ever left us a minute.

Q. Well, referring to this particular Sunday, the Sunday before the case was given to the jury, shortly before or at luncheon time, either on Saturday or on Sunday—on a Saturday or a Sunday, at about luncheon time, that Mrs. Henderson was 30 or 40 feet away from you and your husband?

A. I don't think so. I don't think she ever left us.

Q. And isn't it a further fact that at that same time some of the other jurors were standing at the staircase, or about at the staircase, waiting for you and your husband to get through

with your conversation so that you could go down to luncheon?

107 A. I don't think so, because they always went down when they were ready, and we came when we were ready. They never waited for us.

Q. Or perhaps they were waiting for some other jurors there?

A. Well, they would have to wait for all the men, because they were in charge of one bailiff, but there were times that they went down to the dining-room before we did, two or three minutes.

Q. Well, would you say that it was not a fact that at least at this one time, that Mrs. Henderson was not at least 30 to 40 feet away from you at the time you were talking with your husband?

A. Well, I don't remember Mrs. Henderson ever leaving us for an instant when Mr. Clark was there.

I sent letters during the time that I was a juror. And I received letters. Mrs. Henderson always read them first. She read all of the letters that I sent. Well, I always gave them to her. These letters were addressed usually to my mother and another friend out in California.

This forenoon I testified that sometime during 1925 my husband and I went down to Florida, and while I was in Florida, I worked for the Nash automobile agency. Well, I don't know just exactly how long I was there, because I went in, in just the busy time, half days, Saturday afternoons and odd times during the course of business. I don't know just how long it would last.

Q. I will ask you if it is not a fact that when we were at your house on November 3rd, 1931, you made the following answers to the following questions:

"Q. When did you work for the Nash automobile agency?

"A. Well, that was in Florida.

"Q. That was in Florida? A. Yes.

"Q. And was that occasionally, or did you work on that job regularly?

108 "A. No—maybe a half a day two or three times, that is, the work that I had reference to, that I did down there; one or two Saturdays, that is about all I did down there."

Did you so state? A. Yes, I think I did.

Q. And you were able to remember on September 1st, 1931, about working for the Nash automobile agency, the entire work of which consisted of two or three half days?

Well, I think it was more than two or three half days. I don't know exactly. I recollect that at various times I worked

during the busy rush. I don't know how many days I was there.

I don't remember whether I talked to my husband about the Foshay case, after I received the summons from the Court telling me that I was called as a juror, or as a prospective juror. After I found out from my sister, Mrs. Brown, that I was called for the Foshay case, I don't remember whether we had any discussion about the case or not after that. I don't know how much discussion we had. I do remember that my sister told me I was going to sit on the Foshay case. I remember that. My sister told me that before September 1st, 1931.

At the time I talked with Mrs. Passer and Mrs. Johnson and Mrs. Anderson, I knew that I had been called for the Foshay case.

Q. Now, was the statement that you made this morning, that you were trying to shield somebody, a correct statement, Mrs. Clark? A. Why, yes.

Q. Are you sure about that, Mrs. Clark? A. Yes, I am.

Q. Now, I will ask you if it isn't a fact that the statement that you did not know that you were being called for the Foshay case, was a volunteered statement by you—that I had not asked you any questions about that at all, and that you volunteered that information? A. I don't remember.

Q. I will ask you whether or not is it not a fact that you made the following answers to the following questions at
109 your home on the afternoon of November 3rd of this year:

"Q. After you received notice from the marshall that you were called on the panel, and would have to appear on September 1, 1931, did you and Mr. Clark discuss the possibility of your being on the jury?

"A. Oh, I suppose we did; we discussed—yes, we did.

"Q. And did he at that time discuss, or make mention of the fact that Mr. Foshay was a friend of his?

"A. No, he did not.

"Q. And that he had had considerable transactions with Mr. Foshay?

"A. No, he did not, absolutely not; in fact, I did not know that it was the Foshay jury that I was called for; I did not know that until I got down into the court room; and I got my call, my letter, so I went down there, and I figured it was just going to be one of the bootlegging cases; that is what I thought I would be called on."

Did you so state, Mrs. Clark?

A. Well, I imagine I did if it is all down there in the book.

Q. And there wasn't any occasion for you at that time to be

shielding anybody, because you were making a voluntary statement?

Mr. Ueland: Objected to as argumentative.

Judge Nordbye: Objection sustained.

Q. Now, with reference to Mrs. Henderson sitting close by you when you and your husband were talking, I will ask you again if it isn't a fact that on the Saturday or Sunday
110 preceding the Friday when the case was submitted for deliberation of the jury, that you and your husband were discussing matters a distance of not less than 30 feet from Mrs. Henderson?

Mr. Ueland: All this may be subject to my former objection?

Judge Nordbye: Yes.

A. Well, I don't think that is right. I don't think Mrs. Henderson ever left us for a minute at all. I don't remember her doing it.

Q. When you got into the court room on September 1st, did you at that time desire to be excused as a juror?

A. I didn't think of it, when I was here, that it could be done. I didn't think of asking for an excuse while I was here, no.

Q. When you talked with your sister, do you remember, in addition to her telling you that it was the Foshay case, that furthermore she told you that you need not worry about it, because anyway you would be disqualified because you worked for the W. H. Foshay Company?

A. I don't think she told me that, although she said this morning that she did. It may be so, but I don't remember that.

Q. And did you on the morning of September 1st, or during the day September 1st at any time during that day, desire to be excused as a juror in that case?

A. I don't think it occurred to me, no.

Q. But you do recall telling me at your home, that you did not want to sit on that jury or any other jury?

Mr. Ueland: Objected to as having been covered several times before.

Judge Nordbye: She may answer.

Mr. Ueland: Exception.

Q. Do you remember that you told me at your home
111 that you did not want to sit on that jury or any jury?

A. I don't remember whether I made that remark or not.

Q. I will ask you if it isn't a fact then that the following questions were put to you, to which you made the following answers:

"Q. When you were waiting there, not knowing whether

your name would be drawn or not, did you have any discussion with any other prospective jurors about the possibility of your acting on the case? A. No, I don't believe so.

"Q. Were you very eager to get on this case?

"A. No, I was not.

"Q. You were not? A. No, I was not.

"Q. Did you want to get on this jury?

"A. I should say I did not; in fact, I did not want to get on any jury."

Do you remember so stating?

A. Well, I suppose I must have, if it is in there.

Q. And further that you made the following answers to the following questions:

"Q. You did not want to get on this jury for the purpose of earning the money?

"A. No, I did not; absolutely not—as badly as we needed the money.

"Q. Do you remember telling one of the prospective jurors that you were afraid that you would be disqualified because you had worked up in the Tower?

"A. I did not tell anybody that at all.

"Q. You did not tell anybody that?

"A. Absolutely not.

112 "Q. Do you remember telling anybody that you prayed every minute that you would get on this jury?

"A. I should say I do not. After what I said at home, about not wanting to be on the jury, that is rather funny."

Do you remember so answering the questions that I put to you? A. Yes, I think I answered them in that way.

Q. But when you got here, you did not want to be excused—is that right?

A. I don't think it occurred to me after I got here.

No, I did not have some special reason for wanting to be on that jury. No, I did not tell Mrs. Passer that I had some special reason for wanting to be on this jury.

Q. What did you mean then by the statement that you made at the house, that you did not want to be on that jury or any jury?

A. Well, I said—I don't remember just how I said it, but I know I didn't want to be on that particular jury.

Q. Why didn't you want to be on that particular jury?

A. Simply because I was expecting a guest at that time, and I wanted to be free that first week, to spend the week with her.

I don't remember that Mr. Mabry was a depositor at that bank. I have never known Mr. Mabry. My desk in the bank was in the bank, in the banking room. I would not see all

of the customers that came in and out of the bank. Well, no, I would not. The cages were in front of my desk. I was sitting back behind the cages, and I was busy with my work. I was not watching everybody that came in and out of the bank. I drew some of the minutes of the bank. I don't know whether I drew them always, but I drew some of them. When people would borrow money from the bank, I did not prepare the notes for the borrowers as a rule. I may have some, but I don't remember doing that in my work. No, I don't remember
113 that Mr. Mabry was a borrower at the bank during the time I was working at the bank.

I knew Mrs. O'Hearn, Mr. Mabry's sister-in-law, casually as being one of the depositors in the bank, that's all. I never knew Mr. Mabry was a depositor in the bank, or knew him in any way. Well, I knew Mrs. O'Hearn during the time I was in the bank. I don't know how long during that time, but I have never seen her since we left St. Paul, which is perhaps seven years ago. I never belonged to the same clubs that she did. No, I don't think I ever attended any club meeting where she was present. Well, when I first saw her in the court room I recognized her face and knew that I had seen her and known her somewhere. She smiled a greeting to me and I smiled at her without knowing who she was, that is, what her name was, for a long time.

I first found out what her name was shortly before the trial was over. Mrs. Henderson told me.

I didn't know who Mrs. Mabry was until just before the trial was over. Mrs. Henderson told me that.

Mrs. Henderson told me what Mrs. O'Hearn's name was, yes. Mrs. Henderson was talking to her out in the corridors, talking to her at one time—I don't remember whether it was at recess time or not, or before Court started, and afterwards we discussed it, and I asked her—I don't remember whether I asked her who she was, or whether Mrs. Henderson saw me smiling at her—I don't remember what the situation was that brought it about, but Mrs. Henderson told me that it was Mrs. O'Hearn, and I said, "Oh, that is the name. I remember that name now. I remembered her face but I couldn't place the name."

Q. I will ask you if you did not make the following answer to the following question on the afternoon of November 3rd, at your home:

"Q. Do you know a Mrs. O'Hearn? A. Yes, slightly.
114 "Q. How long have you known Mrs. O'Hearn?

"A. Well, I knew her in St. Paul; she had an account in the bank, and I had just a speaking acquaintance with her, and I have never seen her from the day we left St. Paul, which is, perhaps, seven years ago, until I saw her sitting in the

court room there, and I smiled 'Good morning' to her each morning, and she smiled to me. I could not place her; I could not think what her name was then. Finally, out in the corridor one day, I heard someone come up and address her, and say, 'How do you do, Mrs. O'Hearn,' and that is how I remembered her name, because that is the first time I had seen her, and I did not know her in St. Paul, because I was not friends with her at all; it was simply that I would see her occasionally whenever she would come there; she had an account there."

Did you so answer my questions? A. I imagine I did.

Q. Well, now, did you state in that answer, that the one that told you, or that the one you were talking to here, was Mrs. Henderson? A. No, I did not say that.

Q. You wanted to shield Mrs. Henderson on that then?

A. Well, I would like to have.

Mrs. Henderson told me who Mrs. Mabry was. Well, she asked me—as I remember, she asked me when she was telling me who Mrs. O'Hearn was, if I knew Mrs. Mabry, or knew that Mrs. Mabry was a sister of Mrs. O'Hearn's. I believe that is the way she put it, and I said, "No, I didn't know that," and I think I asked her at that time whether that was Mrs. Mabry sitting beside Mrs. O'Hearn, because she looked
115 enough like her to be her sister. I think that is the way that conversation was.

I don't remember whether Mrs. Henderson told me that Mrs. O'Hearn and Mrs. Mabry were there almost every day. That may have been discussed.

Q. Well, isn't it a fact that you stated at your home on the afternoon of November 3rd: "Mrs. Henderson said that she (referring to Mrs. O'Hearn) had been there almost every day"?

A. She may have said that. I think that was true. I think we discussed that.

No, we did not discuss the attorneys or the case at all. Mrs. Henderson told me that she was not to talk to me about the case.

I went out to see Mrs. McFarland. I got special permission from Judge Molyneaux to see Mrs. McFarland. I went out to see Mrs. McFarland because she was ill. Well, she had been ill for a long time. Shortly before I came onto the jury, her daughter called me up and told me her mother had had a little bad spell, and asked me if I would like to come over and see her, and I told her I would go over in two or three days. Then after that I was locked up on the jury. I got to thinking of her—thought of her several times, and as I remember it, Mr. McFarland read in the paper at one time that I was ill, and called up Mrs. Henderson and asked her how I was, and Mrs. Henderson asked Mr. McFarland then about Mrs. McFarland.

I had been discussing Mrs. McFarland with Mrs. Henderson, too. And I think it was at that time—I don't know whether it was then that Mrs. Henderson told him that I had gotten permission to go over and see her or not. I don't know whether that was later, and he was going to let us know when we could come over, when she would be well enough for me to see her.

Q. Well, now, you remember at your house, when I asked you about that incident, you did not mention or say anything about the telephone calls from Mr. McFarland to Mrs. Henderson?

116 A. No, I didn't think of that until the day that Mrs. Henderson testified on that. It was through the daughter that I got my information before I left, that she was very ill.

Q. Well, isn't it a fact, Mrs. Clark, that the reason you did not state that your husband was president of the bank, before he got into the real estate business was first, because he had gotten into difficulties, or had some difficulty with the State Banking Department, and second, because in 1925, about the same time, he had been indicted for perjury?

Mr. Ueland: That is objected to. She was not asked under examination by Judge Molyneaux whether her husband was president of any bank.

Judge Nordbye: She may answer.

A. I didn't know that at all. I did not know he had been indicted for perjury. It was not in the newspapers, that I know of.

Q. That he and an attorney were indicted at Buffalo, Minnesota, in 1925, for perjury in connection with some land transaction? A. I did not know it. I certainly did not.

Q. Wasn't that the reason you and your husband went down to Florida in 1925 and stayed down there until this perjury indictment blew over?

A. I should say not. That had nothing to do with it.

Q. You knew your husband had had difficulties with the State Banking Department? A. No, I did not know that.

Q. Well, when your husband was president of the bank, didn't he give you any reason why he severed his connection with the bank? A. Why, he sold his stock, as far as I know.

Q. Didn't he tell you he was having difficulties with the bank? A. No.

Q. Didn't he tell you that they had an examiner in the bank nearly every day? A. No.

117 Q. What is that? A. No, I did not know that.

Q. And further, isn't it a fact that you did not want to identify your husband as being the D. D. Clark who was connected with the Citizens State Bank of St. Paul, and isn't

that the reason you did not tell the Court that your husband was in the banking business? A. No, it is not.

Re-Direct Examination.

By Mr. Ueland:

This conversation I had with Mr. Farber and Mr. Peterson during the first week of the Foshay case took place out in the corridors during recess. As I remember it, the three of us were against the railing, discussing the case, and I made the remark at that time during the course of the conversation that I had heard it talked, or I think my words were, that it was common talk around Minneapolis that Mr. Foshay had attempted to get money, was in the East arranging for a loan, but because of the market crash he had not been able to get it, and after we had gotten that far one of the gentlemen—I don't remember which one it was—said, "I believe we were instructed not to talk about this case," and I said, "You are right, we should not have said anything about it, and we better stop right here," and we did stop talking immediately, and said no more about the case then until we got into the jury room. Well, I had remembered hearing from various sources around the city at the time of the crash that Mr. Foshay was in the East attempting to arrange a loan, and that he had not gotten it, because of the market crash at that time, and he had to come home without it. That was simply hearsay. I had no foundation for that at all. I do not know that it is so.

Re-Cross Examination.

By Mr. Horowitz:

I discussed this comomn talk about Foshay going East for a loan with Mr. Peterson and Mr. Farber. Well, when I heard it, it was about the time of the crash two years before. I don't know who I heard it from. When I heard this common
118 talk I don't know whether I discussed that with my husband or not. That was two years before. My husband did not tell me that he knew Foshay. Or that he had had business transactions with him.

Q. That he knew Mr. Mabry well enough so that he called him by the nickname of Paul instead of Palmer?

A. He never told me that at all. No, absolutely not.

Q. Well, now, at that same time, in addition to that statement, did you tell them that you understood or you believed rather—you stated, did you not, that Foshay was a victim of circumstances, when you were out in the hall?

A. I don't remember making that statement. I don't remember how the conversation started. We were just all talking together there, the three of us were, and I don't remember what the conversation was about. There was no evidence up

to that time, in the trial of the case, in which I was acting as a juror, that Foshay had gone East to get a loan, and had failed, and all that. Not that I remember of. There wasn't any such testimony from the beginning to the end of the case that I remember of, no.

Q. Well, did you tell those men that you believed that Foshay was a victim of circumstances?

A. Not that I remember.

Q. You don't remember that? A. No.

Q. Didn't you also at one time state to one of the jurors at the Andrews Hotel that, well, you were against the Government anyway, because they didn't treat the soldiers right?

A. That is one statement I never made in my life to anyone, because that isn't my opinion, and I never made it to them or anybody else, never.

119 Mr. Ueland: I have here Mr. Ackerman's transcript of examination of Mrs. Passer when she was examined as to her qualifications as a juror. Will counsel waive the foundation?

Mr. Horowitz: Yes, the only objection I have is as to the materiality of her examination at that time.

(Defendant's Exhibit D marked for identification by the reporter.)

Mr. Ueland: The examination by Judge Molyneaux was in part as follows: "Q. Have you ever talked with anybody about the case?" "A. I have never mentioned it to a soul." It appears by Mrs. Passer's testimony a week ago Monday that her examination followed the alleged conversation that she had with Mrs. Clark. We offer that much of her examination in evidence.

Judge Nordbye: It may be received.

Mr. Ueland: Respondent rests.

MATILDA ANDERSON, a witness called on behalf of the Government, testified as follows:

Direct Examination.

By Mr. Horowitz:

I live at Mankato. I was one of the jurors called on that panel in the Foshay case. I was here in the court room on September 1st, 1931. Well, I asked Mrs. Clark—the first thing I asked her was where she was from. That was my first question. That was here in this court room. In the afternoon, I think.

Q. Now, just give the conversation that you had with Mrs. Clark.

Mr. Ueland: Now, just a minute; if the Court please, this is not rebuttal.

Judge Nordbye: Well, we will receive it, counsel. Of course if it pertains to a matter which would require additional investigation on your part, additional time to
120 prepare your defense, the Court might be well justified in giving you that time, but I take it that at most it refers to a conversation that she alone can rebut, and I do not see that you are going to be jeopardized by the reception of the testimony.

Mr. Ueland: Exception.

Well, I had very little conversation with Mrs. Clark. I only just expressed my opinion, that I really did not know if I would like to serve on a jury of this kind or not, and Mrs. Clark's answer was that she would like to serve, but thought probably she would not be accepted on account of working there. Just working for the parties, working there. That is just what she said. That's all the conversation we had. That was the extent of the whole conversation.

Cross Examination.

By Mr. Ueland:

She said she would like to serve on the jury, but did not know that she would be accepted on account of being working there. Well, working, I think, for the Foshay employment. Well, I mean, working for the Foshay people, I suppose. Working for the Foshays. She said that she would like to serve on the jury. But did not know if she would be accepted. Well, it was just—she just said that she would like to serve on the jury but did not know that she would be accepted—was not sure that she would be accepted because she worked there for those people. That's all the conversation we had. Well, I didn't ask her what people. Because she worked there, because she worked at that place.

I was called as a juror in this case. That was in the morning. I was the second one up there—the second one of the jurors called. I talked to Mrs. Clark afterwards, after lunch, afternoon. I was sitting in the back seat over there. Right in the back seat there. When we were talking, I sat on the right-hand side of the room as I sit here. Mrs. Clark was on
one side and Mrs. Johnson on the other, and the lady
121 from Olivia was farther over on the other side. And the lady from Olivia was—well, she was next—I don't know if there was anyone between her and Mrs. Clark or not. I don't know. This was in the afternoon.

I didn't talk to anybody here about this conversation I had with Mrs. Clark. I was only here one day, and I left the room

right away. I guess I spoke about it at home. I didn't speak about it here.

I guess the postal inspector at home came up and wanted to know whether I had had a talk with Mrs. Clark. That was on last Monday, I think. Well, I haven't talked to anybody except when I spoke about it to my own family. I think this postal inspector's name is Gushy or something. He is the postal inspector at home. He just asked me if I was here, and if I spoke to Mrs. Clark. That's all he said. Well, he didn't ask any other questions, only if I was here and if I spoke to Mrs. Clark, like the other ladies. That's all that was said. He wasn't in my house I don't think five minutes. He asked me if I spoke with Mrs. Clark and I said, yes, and I told him just what I told you. Well, he was just asking me if I was down here called as a juror, and he asked me if I was speaking to Mrs. Clark, and that's all that was said. We didn't say anything more. I stated what Mrs. Clark said that's all. I told him just the same as I told you here.

We had the local paper. We haven't got the Minneapolis papers. Sure, I read or see the Minneapolis paper once in a while, if we buy one.

I was examined second. I was right in this room when I was examined. I stayed here all day. I came back there in the afternoon, but we had recess. We had a recess at noon, like we had today. In the afternoon I was sitting over here.

Q. Well, then how could you have been back there talking to Mrs. Clark?

A. That was before the Court was called. Well, I suppose a little bit before one and two, or before the Court was called.

Court was called at two.

122 Re-Direct Examination.

By Mr. Horowitz:

I did not know Mrs. Passer before. I did not know any of the ladies. I have never seen them since.

STEPHEN J. PICHA, a witness previously called on behalf of the Government, re-called by the Government for further examination, testified as follows:

Direct Examination.

By Mr. Horowitz:

Government's Exhibit 13 is the regular form used by the marshal's office for calling jurors. That form was used in calling the jurors for the Foshay panel.

Mr. Horowitz: We offer in evidence Government's Exhibit 13.

Judge Nordbye: It may be received.

123 Exhibit 13 is a printed form of summons for juror. It contains the following footnotes:

"Mail excuses and claims for exemption to Joel M. Dickey, Clerk U. S. Dist. Court, St. Paul, Minnesota.

Special Notice.

"If you have moved out of the judicial district, wish to claim exemption from jury service, or desire to be excused from such duty, you should state the facts briefly and clearly, supporting your statement by affidavit and mailing it at once to the United States district judge. Unless you receive a communication excusing you, you should attend as directed by summons."

ANDREW FARBER, a witness previously called and sworn, recalled by the Government in rebuttal, testified as follows:

Direct Examination.

By Mr. Horowitz:

During the time I was a juror all of the jurors were stopping at the Andrews Hotel here in Minneapolis. Our rooms were on what is known as the mezzanine floor, or opened on the mezzanine floor there. I recall on the mezzanine floor a public stenographer's desk, a place where a public stenographer worked. The public stenographer has a desk with a typewriter in it. While I was a juror, I observed Mr. and Mrs. Clark. With respect to the day that the case was finally submitted to the jury for their deliberation, that was on Saturday or Sunday, the Saturday or Sunday before. The case was submitted to us on a Friday.

Q. At the time you observed Mr. and Mrs. Clark, where were they?

Mr. Ueland: Objected to as not proper examination, irrelevant and immaterial, not within the issues in this case.

The Court: Objection overruled.

They were sitting towards what I believe they call the front of the building, on the second floor on the mezzanine floor. At the front of the building, on the second floor. We were waiting, just back in the small smoking parlor, on the same

124 floor. By "we" I have reference to, I believe, all the jurors in the room where I stayed. There were six of us in that room. I observed Mrs. Henderson. She was standing by the railing of the stairway, and I suppose she was talking to the stenographer.

Q. And what distance was there between Mrs. Henderson

or where Mrs. Henderson stood, and where Mr. and Mrs. Clark were conversing?

Mr. Ueland: The same objection.

The Court: The same ruling.

Mr. Ueland: Exception.

A. I should judge from about 30 to 40 feet. The first time that I observed them talking there was right at the noon recess.

Mr. Ueland: May my objection go to all this testimony?

Judge Nordbye: Yes, it may be so understood.

A. (Continued.) We were getting ready to go to lunch. The bailiff had already called us from our room, and we were waiting for the members in the other room, because we had to go down together, and I observed them there, as soon as we came out on the floor. They were there then. Mrs. Henderson, when I first saw her, was talking with the public stenographer by the railing.

Q. And for how long a time was she there while Mr. and Mrs. Clark were 30 or 40 feet away, before you left?

A. Well, we stayed there possibly two minutes. It is hard to say exactly, but we had to wait a short time for the other members of the jury.

I do not know when Mr. Clark arrived there, or how long he had been there before I got there. At that time I called attention to that situation to Mr. Peterson and Mr. Dahl.

Mr. Ueland: No cross examination.

125 PETER A. PETERSON, a witness previously called and sworn, re-called for further examination, testified as follows:

Direct Examination.

By Mr. Horowitz:

Mr. Ueland: May I have the same objection to all this line of questioning?

Judge Nordbye: It may be so understood.

I was sworn and was one of the jurors in the so-called Foshay case. I stayed in number 15 at the Andrews Hotel, I think the number of the room was. I stayed in the same room with Mr. Farber, yes. I recall an occasion on the Saturday or Sunday preceding the day the case was submitted to the jury for deliberation, seeing Mr. and Mrs. Clark. At the time that I saw Mr. and Mrs. Clark they were sitting—they were about 30 or 40 feet from the railing, I guess, or from the stairway. From that stenographer. The stairway going up to the mezzanine floor. I imagine they were about 30 or 40 feet towards the front of the building. Mrs. Henderson at that time was standing by the railing.

Q. And how far from Mr. and Mrs. Clark?
A. About 40 feet.
Mr. Ueland: No cross examination.

GEORGE A. DAHL, a witness previously called and sworn, recalled by the Government in rebuttal, testified as follows:

Direct Examination.

By Mr. Horowitz:

I was one of the jurors in the Foshay case, so-called. I was in the same room with Mr. Farber and Mr. Peterson at the Andrews Hotel. I recall an occasion on the Saturday or Sunday preceding the Friday when the case was finally submitted to the jury for consideration and deliberation, seeing Mr. and Mrs. Clark. They were sitting back farther from the railing, towards the front of the building. On the mezzanine floor there. Mrs. Henderson was next to the railing. Oh, I should judge she was between 30 and 40 feet from Mr. and Mrs. Clark.

126 Q. As a matter of fact, how did you arrive at that distance? Did you make any effort to check it up?

A. We did.

Q. Well, how did you—did you step it off? A. Yes.

Q. And how did you happen to particularly observe the fact that Mrs. Henderson was some 30 or 40 feet distant from Mr. and Mrs. Clark?

A. Well, Mrs. Clark always made the remark to us that she was kept rather close with Mrs. Henderson, with her husband, and that they did not get a chance to discuss affairs, and Mrs. Henderson kept very close around, and seeing this particular incident it kind of drew our attention, she being so far away.

Mr. Ueland: No cross examination.

HUGO J. ACKERMAN, a witness previously called and sworn, re-called by the Government in rebuttal, testified as follows:

Direct Examination.

By Mr. Horowitz:

I remember the time that Mrs. Clark was being examined by Judge Molyneaux on September 1st, 1931. I did not have any difficulty in hearing Mrs. Clark. I have my notes with respect to the testimony of Mrs. Clark on that date.

Q. I want to call your attention particularly to the notes on the question that reads as follows: "How long has he been in the real estate business?" "A. For about five years." "Q. Was he in some business before that?" and what do your notes show her reply was?

A. "Well, we were out of the city for two years, when he was not doing anything. Before that, he was in the real estate and insurance business."

Q. Do you have any symbol there, does it show any symbol which indicates that that was the end of the sentence?

A. I have a line indicating a period. I am sure that the answer was not, that he was in the real estate and insurance business and banking business.

127 Cross Examination.

By Mr. Ueland:

My hearing is good.

Q. As good as average? Did you hear my last question?

A. Yes.

I never had occasion to have my hearing examined. I do make mistakes like the rest of them, yes.

Mr. Horowitz: The Government rests.

Mr. Ueland: I would like to make a few motions for the record. Respondent moves to strike all evidence from the record which has to do with the statements made in the jury room, after retirement. Further, the respondent moves to strike out all testimony relating to transactions and statements made subsequent to the examination of Mrs. Clark on September 1st, 1931, except such testimony as bears upon what was said by Mrs. Clark after that date, outside of the jury room; third, respondent moves to dismiss the petition and rule to show cause on the ground that it appears from the petition and the evidence, that the Court has no jurisdiction to punish the respondent for contempt; fourth, respondent moves that the Court find the respondent not guilty of contempt on the ground that the evidence will not support a conviction of contempt. May I be allowed an exception in case those motions are denied?

Judge Nordbye: The motions will be taken under advisement at this time. Do counsel care to be heard before the matter is finally submitted?

Mr. Ueland: Yes, I want to be heard.

Mr. Horowitz: If the Court cares to hear us, I will be glad to discuss the case, or we will waive our opening arguments, if your Honors feel that it is necessary to go into the evidence—either way that the Court feels about it.

Judge Nordbye: Well, you may proceed and state your position. Mr. Ueland will be given an opportunity to reply.

128 (Arguments by Mr. Horowitz.)

(Afternoon session.)

(Arguments by Mr. Ueland.)

(Adjournment on November 20th, 9:30 o'clock A. M., at which time the following proceedings were had.)

(Arguments by Mr. Ueland continued.)

(Arguments by Mr. Horowitz.)

Judge Nordbye: We will take the matter under advisement.

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129 (Proceeding in Nature of Arrest of Judgment and Sentence.)

Hearing before the Court, Honorables John B. Sanborn and Gunnar H. Nordbye, presiding—December 26, 1931, at ten o'clock A. M., at the Federal Building, Minneapolis, Minnesota.

Appearances: Robert V. Rensch, Esq., assistant U. S. district attorney, appearing on behalf of the United States of America, and Sigurd Ueland, Esq., appearing on behalf of the defendant.

Thereupon the following proceedings were had: Findings and sentence of the Court, read by Judge Sanborn.

Judge Sanborn: It is the judgment and sentence of this Court—

Mr. Ueland (interrupting): Pardon me for interrupting, but may I have the opportunity to offer evidence in mitigation of the sentence.

Judge Sanborn: Well, now, we considered that matter, Mr. Ueland, and we wondered whether you preferred to do that in advance; you see, there is a stay of execution.

130 Mr. Ueland: Well, just so that the entry of judgment does not foreclose me to be heard on that.

Judge Sanborn: No; you are not to be foreclosed. We thought, probably it would be more appropriate to take it up during the time when the stay was in effect, rather than at this time, although, if you prefer to be heard now we will be glad to hear you.

Mr. Ueland: Well, I didn't want to interrupt the Court, but I think I shall want to offer evidence in mitigation of the sentence. I suppose that should come before the sentence.

Judge Sanborn: The situation is this, Mr. Ueland, in this Court—during the time of the stay of execution of sentence, and, as a matter of fact during the entire term of court in which the sentence was imposed, this court has the right to modify its sentence in any way that it sees fit, and it also has the right to suspend sentence, or take any other appropriate action, and, unless you prefer that the sentence be deferred, if you see some advantage in that, it occurred to us that it might be better to

dispose of the matter now, and then hear you later on as to whether there should be a suspension or modification.

Mr. Ueland: That is satisfactory.

Judge Sanborn: If that is satisfactory to you, we will leave it that way.

Mr. Ueland: That is satisfactory.

Judge Sanborn: It is the judgment and sentence of this Court that Genevieve A. Clark as punishment for the contempt of this Court, of which she has been found guilty, be confined in the county jail of Ramsey county, Minnesota, for a period of six months, and that she pay a fine of one thousand dollars; that execution of this sentence be stayed for forty-two days, and that she be released upon her own recognizance.

This is signed by Judge Nordbye and myself.

Judge Sanborn: The Court will adjourn at this time.

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131 (Stipulation for Settlement of Bill of Exceptions.)

It Is Hereby Stipulated, that the foregoing consisting of one hundred sixteen (116) typewritten pages may be presented to the Court without notice as the bill of exceptions herein and may be allowed and certified by the Court as the bill of exceptions herein containing, in condensed form, all of the evidence offered and received at the trial of the above cause and all material proceedings in the course of said trial.

L. L. DRILL, U. S. Atty.
FRED HOROWITZ, Spec Asst
Atty Genl
Attorneys for the Government

SIGURD UELAND
Attorney for Respondent.

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132 (Order Allowing and Approving Bill of Exceptions.)

The respondent having duly tendered this her Bill of Exceptions herein, consisting of one hundred sixteen (116) typewritten pages, together with stipulation of counsel consenting to the settlement of the same as the Bill of Exceptions herein which, having been examined by the Court and having been found to conform to the truth and to include all of the evidence offered and received at the trial of the above cause and all material proceedings in the course of said trial,

It Is Hereby Ordered, that said Bill of Exceptions be, and it hereby is, allowed and approved, and the same is ordered by

the said Court to be filed and made a part of the records in this cause.

Dated this 13 day of February, 1932.

GUNNAR H. NORDBYE
Judge of United States District Court.

Filed in the District Court Feb 13, 1932.

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133 (Findings and Conclusions—Judgment and Sentence.)

This cause was heard by Judges Nordbye and Sanborn on the 9th, 19th and 20th days of November, 1931, upon an information charging the respondent, Mrs. Clark—who was one of the jurors in the case of United States v. Foshay, et al., the trial of which commenced on September 1, 1931—with contempt of Court for having committed perjury upon her examination as to her qualifications as a juror by Judge Molyneaux, to which information she filed her response, denying the charges made therein.

Mr. Fred Horowitz, Special Assistant to the Attorney General, Mr. L. L. Drill, United States Attorney, and Mr. Robert V. Rensch, Assistant United States Attorney, appeared for the Government; and Ueland & Ueland, and Mr. Sigurd Ueland appeared for the respondent.

The facts, as we find them from the admissions of the parties and the evidence, are as follows:

Mrs. Clark at all the times here material was a resident of Minneapolis, Minnesota, and the wife of D. D. Clark. On August 24, 1931, Mrs. Clark received a summons to report as a juror on September 1, 1931, at the Federal building at Minneapolis, Minnesota. The jurors who were summoned to report on that day were all called in connection with the trial of the case of United States v. Foshay, et al. At the time
134 Mrs. Clark received her summons, she desired to be excused from service during the week of September 1st. She did not then know for what case she was called. Shortly thereafter, she telephoned her sister, Mrs. Brown, at the Federal building in St. Paul, and made inquiry as to how she, Mrs. Clark, could be excused or her term of service as a juror postponed. Mrs. Brown called upon Miss Mullane, the chief deputy clerk of this Court at St. Paul, and then called Mrs. Clark advising her that if she wished to be excused, she must see the judge when she reported on September 1st. Her sister further informed her that the trial for which she was summoned was the Foshay trial, and that she would probably not be accepted, since she had been employed by the Foshay Company, which

was one of the companies with which the defendants had been connected.

Mrs. Clark, on the morning of September 1, 1931, called at the office of her husband and a Mr. Wille, with whom Mr. Clark was associated, and then, in company with Mr. Clark, reported at the court room in the Federal building in Minneapolis where the case was to be tried. The other members of the panel were assembled in that room. Judge Molyneaux presided and examined the jurors as to their qualifications as jurors. Mrs. Clark, while the jury was being drawn and before she was called for examination, made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her. That she had worked for the Foshay Company as a stenographer or typist for about two weeks in the summer of 1929, but she did not know or come in contact with any of the defendants personally.

Her husband, for a number of years prior to September 1, 1925, was president and in charge of the Citizens State Bank of St. Paul. Prior to Mrs. Clark's marriage to him in 135 1922, she had also worked in the bank as a clerk and stenographer and had had the title of assistant cashier. One of the defendants had been a depositor and borrower of the bank while Mrs. Clark was working there, and he was well acquainted with Mrs. Clark. Mr. Clark also knew Foshay and had done business with him and with his company.

Mrs. Clark was called to the jury box, sworn to make true answers touching her qualifications to serve as a juror, and questioned by Judge Molyneaux. The portion of her examination which is here material is as follows:

"Q. What is your husband's business?

A. In the real estate business.

Q. In what way is he in the real estate business, is he with some firm, or is he by himself? A. He is by himself.

Q. Does he deal in city property? A. Yes, sir.

Q. Is he selling property on commission—making a commission? A. Yes, sir.

* * * * * * * * * * *

Q. How long has he been in the real estate business?

A. For about five years.

Q. Was he in some business before that?

A. Well, we were out of the city for two years, when he was not doing anything. Before that, he was in the real estate and insurance business.

Q. Have you yourself ever been in any business of any kind?

A. I have been a stenographer before my marriage, yes.

Q. In what kind of business did you work?

A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency.

* * * * * * * * * * *

Q. Do you know any of the lawyers in this case?

A. No, I do not.

136 Q. Or any of the defendants? A. No, I do not.

* * * * * * * * * * *

Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other? A. Yes, I do feel that way.

* * * * * * * * * * *

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court? A. Yes, I do."

Mrs. Clark was the only woman upon the jury and the twelfth juror to be accepted. The jury was then sworn and placed in the custody of the United States Marshal, and throughout the trial, which lasted approximately eight weeks, was in the charge of two officers, one a man and the other a woman. During the first week of the trial, Mrs. Clark made the remark to several of the jurors, on one occasion, that she regarded Mr. Foshay as a victim of circumstances; that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, had come back without a dollar. When asked by one of the jurors where she had procured that information, which concededly was not based upon any evidence in the case, she said that it was from a newspaper which she had read before the trial and had forgotten about. At a later period, she expressed to other jurors dissatisfaction with the Government because of the way the soldiers were treated after the war. During the deliberations of the jury, after the case was finally submitted, she announced that, since Mr. Horowitz had been unable to convince her of the guilt of the defendants, the other jurors could hardly expect to do so. She virtually closed her ears to the arguments of other jurors, and made a statement with respect to the Government witness Cobel, the effect of which was to charge him with having given perjured testimony in a case in the south in an attempt to

137 convict an innocent man. This statement was obviously based upon information given to her after the trial commenced by her husband, who was permitted to visit her about once a week during the trial and converse with her supposedly in the hearing of the woman bailiff. This information conveyed by him to his wife he had received from a Miss Todd, who was

connected with the firm of Wille & Clark, and who had expressed her opinion about Cobel to Mr. Clark upon seeing Cobel's picture in the newspaper during the so-called Foshay trial. Miss Todd had recognized him from this picture as being the accountant who had testified in a fraud case in Kansas City in which she at one time had been interested. Mrs. Clark, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. She also made statements to the effect that she could not vote to send seven men to the penitentiary. The jury were out for approximately one week, and stood eleven for conviction, and one (Mrs. Clark) for acquittal.

How Mrs. Clark voted in the Foshay case is, of course, of no consequence so far as we are concerned in this proceeding.

We are limited by the information filed by the Government to the question whether Mrs. Clark was guilty of contempt of court because of the answers which she gave to the questions touching her qualifications to serve as a juror. If her answers were so false or deceptive as to obstruct the Court in the performance of its duty, that was contempt, whether it amounted to perjury as defined by the statute, or not.

Perjury may be punished as contempt when it obstructs the Court. Ex Parte Hudgings, 249 U. S. 378. There the Court said (page 383):

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, ap-
138 plied to the subject in hand, exacts that in order to punish perjury in the presence of the Court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty."

From this statement, it would appear that untrue answers to questions asked on the voir dire might be of such a character as to obstruct justice and constitute a contempt of court, although the person giving the answers might not be guilty of perjury in the strictest sense. We think that the essential question is whether the conduct of Mrs. Clark, as charged in the information, constituted an obstruction to the Court in the performance of its duty.

We may not base a finding of contempt upon any acts of Mrs. Clark after she was accepted as a juror, since the information contains no such charges. For such bearing as such acts may

have upon the question of the state of mind of Mrs. Clark at the time she was examined, they may be considered.

Mrs. Clark is presumed to be innocent of the charges made against her, and she may only be found guilty if the evidence establishes her guilt of the specific charges, or some of them, beyond a reasonable doubt. Some of the evidence is purely circumstantial, and therefore, in order to justify a finding of guilt on such evidence, the facts and circumstances proven must be not only consistent with such a conclusion, but inconsistent with any reasonable theory of innocence.

In a jury trial, if justice is to be even approximated, the jurors must be absolutely impartial and fair-minded and be governed by the evidence which is given by the witnesses sworn and examined before them, and by the law as stated by the Court. The purpose of the examination to ascertain the qualifications of each juror is to enable the Court and the interested parties to ascertain whether a cause for challenge exists and whether it is advisable to exercise the right of challenging a juror peremptorily. The reason that the law gives to each party peremptory challenges is to enable both sides in the trial of a lawsuit to secure a jury which all may feel is reasonably free from any bias, prejudice, interest or embarrassing connections with any persons who are or who might be interested in the outcome of the controversy.

139

However, it must be kept in mind that all sorts of people are summoned as jurors and required to serve, whether they wish it or not. Some of them have never been in a court room before. Many have only the vaguest notions as to what their duties are. What seems plain and simple to us, seems strange and complex to them. If we establish rules of conduct for jurors which many might innocently disobey and thereby subject themselves to the possibility of being charged with contempt and fined or imprisoned, we will make jury service a very hazardous and undesirable thing. There can be no presumption that a woman knows her husband's business acquaintances or has anything more than a general knowledge of the nature of his business or business connections. Many women frequently have a great deal of misinformation about their husband's business activities, and it would, ordinarily, be unreasonable to find a woman guilty of contempt because she failed to accurately state the facts with reference to the business of her husband, either past, present or future. Furthermore, many people, in the excitement of being examined for service as jurors, forget many things which, under other circumstances, they would remember.

Nevertheless, it may fairly be said to be the rule that a juror owes the duty to the Court and to those who are interested in

the case about to be tried, to answer fully and fairly all questions asked upon the examination to determine his qualifications, to the end that challenges may be intelligently exercised and unsuitable persons excused; and that it is a contempt to wilfully conceal any fact which is material and which the juror knows or believes to be material, and which he has in mind at the time of the examination, provided the questions asked fairly call for the disclosure of that fact.

140 In the case of Pearcy v. Michigan Mutual Life Insurance Co., 12 N. E. 98 (Indiana), the Court said on this subject:

"It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance the appellant had a right to a full and truthful answer from Bowman (juryman) and it was his duty to make that answer without evasion, equivocation, or concealment."

And further said:

"The authorities support our conclusion that if the general question fairly arouses the juror's attention and directs it to the information desired, it is enough, without specific questions covering minute phases of the subject."

A juror should, of course, whether specifically questioned or not, disclose any material information which might bear upon his qualifications, but it would not do to find a juror guilty of contempt for failing so to do, where no question was asked which would fairly call the matter to the juror's mind. A juror cannot be expected to pass upon the question of what is or what is not deemed material by the Court or the litigants on the question of proper qualifications.

There has been an intimation in the press that Mrs. Clark's name was placed on the jury list in an irregular manner, and that considerable mystery surrounds the circumstances of her being on the jury panel. We deem it our duty to state that we are satisfied that she was placed on the jury list in the same manner as the other jurors, and that there is not the slightest foundation to the rumor that her name was surreptitiously placed on the list, or that any ulterior purpose prompted anyone to include her name as a juror.

The evidence would not justify finding that Mrs. Clark

knew any of the defendants. Her employment with the Foshay Company continued for about two weeks. She was
141 employed, however, with a number of typists in a large room doing copy work and did not come in personal contact with any of the defendants in this case.

We cannot say that the evidence conclusively shows that Mrs. Clark wilfully concealed the fact that her husband was associated with Mr. Wille, as claimed by the Government, since we think there is a reasonable doubt as to whether she knew that fact. The association was a recent one, and Mr. Clark and Mr. Wille each had his own business aside from that of the firm. Furthermore, the question as to whether Mr. Clark was by himself or with a firm, was of doubtful materiality.

We cannot say that when Mrs. Clark failed to disclose her husband's former connection with the Citizens State Bank of St. Paul, the evidence conclusively shows that she knew that that was material, that she had it in mind at the time she was examined, or that she wilfully concealed it from the Court. It is probable that she may have done that, but that probability is based upon inferences which leave behind them a reasonable doubt, to the benefit of which she is entitled.

The evidence does conclusively establish that Mrs. Clark, at the time of her examination, did have in mind that she had worked for the Foshay Company in the summer of the year 1929. She had been informed by her sister that that fact would probably disqualify her as a juror in that case. Her discussion with other prospective jurors clearly indicates that she herself was apprehensive that such employment would prevent her from being accepted as a juror. We are convinced that she deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court. It is true that the question asked her as to her employment did not specifically call for that information, but her deceiving answers to the Court's question disarmed the Court. She purposely implied in her answers to the Court's questions that her employment as a stenographer was limited to the period prior to her marriage. It is significant that she
142 mentioned her employment with the Nash agency, which employment was after her marriage and continued for a period of but a few days, but purposely withheld from the Court her employment after her marriage with the Foshay Company. It is our opinion that the Court's question to Mrs. Clark at the time she was examined as a prospective juror fairly required her to disclose her employment with the Foshay Company, and she was given a full opportunity to do so. Her failure to make the disclosure and her cunningly framed an-

swers constituted an intentional concealment of a material matter.

It may be that wilfull evasion and part answers would not constitute perjury in a strict sense as defined in the statute. However, it is our opinion that it is not necessary to find Mrs. Clark guilty of perjury as defined in the statute in order to determine that she is guilty of contempt of court. It is true that the information filed by the Government refers to her evasion and concealment as perjury. However, the information specifically informed Mrs. Clark that she was guilty of contempt on account of her failure to disclose the fact of her employment with the Foshay Company, and that such conduct on her part constituted an obstruction of the Court in the administration of justice; consequently, it is our opinion that her conduct as disclosed by the evidence in this regard amounts to contempt, and that the information as drawn sufficiently complies with the law and advises her as to the charges made with reasonable certainty.

The determination of the falsity of Mrs. Clark's answers to the question of the Court regarding her freedom from bias and her intention to follow the evidence and base her verdict solely on the testimony and the law is connected with some difficulty. It is impossible, of course, to ascertain with mathematical certainty the state of her mind when she was examined as a juror. Proof of subsequent conduct is not conclusive and may not be a safe basis standing alone upon which to predicate
143 a finding as to a past mental state. However, it is our opinion that Mrs. Clark purposely withheld information from the Court so as to be accepted as a juror. Her remarks to her fellow prospective jurors as to her desire to be accepted on the panel and that she had a special purpose in mind, may without any other circumstances, be quite consistent with an honest rather than a wicked intent. Her studied attempt, however, to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror. In light of all the circumstances as developed by the evidence, it is inconceivable that a woman with an honest intention at the outset would endeavor to influence her fellow jurors during the first week of their service with a statement regarding Mr. Foshay being a victim of circumstances. There was an utter absence of any testimony that would prompt such a statement, and while it may be a fact that she was improperly influenced after the trial commenced, she herself contends that no one communicated any information to her regarding the facts, or that any outsider endeavored to influence her after

she was accepted as a juror. If her story is true regarding the absence of any outside influence, there can be no serious question but that her mind was not free and open when she was accepted as a juror, and her answers to the Court in regard thereto were false and untrue. Such false answers obstructed the Court in the performance of its duty and constituted contempt.

We do not believe that public policy requires that proceedings in the jury room be kept secret under the circumstances of this case. Courts are not required to permit any veil of secrecy to prevent them from exposing and punishing the wrongdoing of any juror who deliberately interferes with the proper administration of justice. The rule which prevents the impeachment of a verdict by a juror stands upon an entirely different basis than a proceeding such as this.

144 In McDonald and United States Fidelity and Guaranty Co. v. Pless, 238 U. S. 264, on page 269, the Court said, with reference to the rule that verdicts may not be impeached by jurors:

"The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict."

Our conclusion, therefore, is that Mrs. Clark is guilty of contempt of court to the extent herein stated. While her conduct was reprehensible, we must recognize the fact that it has in a large measure carried with it its own punishment. Mrs. Clark has brought upon herself the contempt of the community in which she lives—not because she voted for the acquittal of the defendants—but because her vote was not believed to represent her honest convictions based on the evidence and the law. We realize that the past disappointments and misfortunes of her husband in business may have created in her mind some antagonism towards organized society. Her willingness to talk to strangers of her desire to serve as a juror, which negatives to some extent the realization on her part of the seriousness of what she was doing, coupled with her unyielding attitude in the jury room, indicates to our minds the probable domination of a will stronger than her own. To these matters we have given consideration. In fairness, however, to the defendants in the Foshay case, and their counsel, it should be stated that there is not one scintilla of evidence that would justify a conclusion that any of them had attempted to improperly influence Mrs. Clark.

So far as Mrs. Clark is personally concerned, she has already

paid a considerable penalty for what she has done; but in this as in most cases of contempt, this Court must not only determine what penalty should be imposed as a punishment to the individual, but also what penalty must necessarily
145 be imposed in order to maintain the dignity of this Court and its reputation as an institution. We appreciate full well that there are some close questions of law involved in this case, and it will be understood that Mrs. Clark will be given a stay of execution for forty-two days, and be at large on her own recognizance so that she may perfect an appeal from the judgment about to be imposed, if she be so advised, and that no supersedeas will be required if she does appeal.

It is the judgment and sentence of this Court that Genevieve A. Clark, as punishment for the contempt of this Court of which she has been found guilty, be confined in the county jail of Ramsey county, Minnesota, for a period of six months, and that she pay a fine of $1,500.00; that execution of this sentence be stayed for forty-two days and that she be released upon her own recognizance.

Dated this 26th day of December, 1931.

JOHN B. SANBORN
United States District Judge

GUNNAR H. NORDBYE
United States District Judge

Filed in the District Court Dec. 26, 1931.

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146 (Petition for Appeal.)

To the Honorables John B. Sanborn and Gunnar H. Nordbye, District Judges:

Genevieve A. Clark, deeming herself aggrieved by the judgment entered in the above entitled cause on the 26th day of December, 1931, does hereby appeal from said judgment to the Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the assignment of errors and prayer for reversal filed herewith.

Genevieve A. Clark prays that her appeal be allowed; that citation issue as provided by law; that a transcript of the record, proceedings and documents upon which said judgment was based be made and duly authenticated and sent to the United States Circuit Court of Appeals for the Eighth Circuit, in the city of St. Louis, Missouri, pursuant to the statutes and rules of such Court in such cases made and provided.

And your petitioner further prays that the Court, by its

order, direct that all proceedings in the above entitled cause in this Court, except the settlement and allowance of the bill of exceptions, be stayed until decision by the United States Circuit Court of Appeals for the Eighth Circuit upon the appeal hereby petitioned for, and until the coming down of the mandate in said cause.

147 Your petitioner further prays that this Court approve the security for costs herewith presented.

SIGURD UELAND
Attorney for Respondent,
Genevieve A. Clark.

Filed in the District Court Jan. 29, 1932.

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148 (Assignment of Errors and Prayer for Reversal.)

Genevieve A. Clark, respondent in the above entitled cause, in connection with her petition for appeal filed herein, makes the following assignment of errors which she avers occurred during the trial of the above entitled cause and were committed by the Court in the rendition of the judgment against respondent appearing on the record herein, to-wit:

1. The Court erred in requiring respondent to proceed to trial upon the return day under the rule to show cause in that said rule to show cause did not advise respondent that testimony would be taken and a trial had at that time and respondent was not allowed a reasonable time in which to engage counsel and prepare for her defense.

2. The Court erred in receiving in evidence over objection by respondent, and giving consideration to testimony of one Andrew Farber that during the first week of the trial of the so-called Foshay case respondent told said Farber "that she believed that Mr. Foshay was a victim of circumstances, that he had went East to arrange for an eighteen million dollar loan, or had it arranged for, and the crash came, and he came back, however, without a dollar," in that such testimony was irrelevant and immaterial to any issue in this cause.

3. The Court erred in receiving in evidence over objection by respondent, and giving consideration to testimony of
149 one Peter A. Peterson that during the first week of the trial of said Foshay case respondent said to said Peterson and said Farber "about Mr. Foshay, that he was a victim of circumstances," and "that he had gone East some place to arrange for a loan of eighteen million dollars, and the crash came and he came back without any money," in that said tes-

timony was irrelevant and immaterial to any issue in this cause.

4. The Court erred in receiving in evidence over objection by respondent, and giving consideration to testimony by said Peter A. Peterson that sometime before the jury retired in said Foshay case respondent said, "The Government had not used the soldiers right," in that such testimony was irrelevant and immaterial to any issue in this cause.

5. The Court erred in receiving in evidence over objection by respondent, and giving consideration to testimony by Fred Foss that before the jury went out to deliberate in said Foshay case respondent "made the statement that she did not have no use for the Government, on account that they did not use the soldiers right when they came back from the war," in that such testimony was irrelevant and immaterial to any issue in this cause.

6. The Court erred in receiving in evidence over objection by respondent, and giving consideration to testimony by said Andrew Farber, one of the jurors in said Foshay case, as to what was said and done by respondent as a juror in said case, during the deliberations of the jury, among other things, that respondent said as long as Mr. Horowitz "could not convince me * * * there was no chance of you eleven men to convince me"; that respondent said, "I wish I could talk to my husband and get his opinion about it, and find out whether I am absolutely wrong or not"; that respondent said with reference to a Mr. Cobel, a witness for the Government in said Foshay case, "Yes, Cobel, I would like to choke him," and other statements alleged by the witness to have been made by respondent with reference to said Cobel; that "at different
150 times arguments would start and Mrs. Clark (respondent) did not seem to be interested—was not listening. Sometimes she held her hands up over her ears, and it was hard to argue with anyone that won't reply. * * * She said that it was getting pretty dry there; she thought she would bring a book * * *" in that all such testimony was irrelevant and immaterial to any issue in this cause and was incompetent because of respondent's privilege as a juror in said Foshay case.

7. The Court erred in receiving in evidence over objection of respondent, and giving consideration to testimony of said Peter A. Peterson, one of the jurors in said Foshay case, as to what was said and done by respondent as a juror in said case, during the deliberations of the jury, among other things, "but I know her attitude was very much one-sided all

the way, so there was not very much discussion, you might say," in that all such testimony was irrelevant and immaterial to any issue in this cause and was incompetent because of respondent's privilege as a juror in said Foshay case.

8. The Court erred in receiving in evidence over objection of respondent, and giving consideration to the testimony of George A. Dahl, Arthur J. Elmquist and Fred Foss, all jurors in said Foshay case, as to what was said and done by respondent as a juror in said case, during the deliberations of the jury, in that all such testimony was irrelevant and immaterial to any issue in this cause and was incompetent because of respondent's privilege as a juror in said Foshay case.

9. The Court erred in receiving in evidence over objection of respondent, and giving consideration to testimony of Alice B.Todd as to statements made by said Alice B. Todd to the husband of respondent, during the progress of the trial of said Foshay case, concerning one C. M. Cobel, a witness for the Government in said case, in that all such testimony was irrelevant and immaterial.

10. The Court erred in receiving evidence over objec-
151 tion of respondent, and giving consideration to testimony of Mrs. Ann B. Henderson, a bailiff in said Foshay case, that during the course of the trial of said Foshay case and before the jury retired to consider their verdict respondent was permitted to visit with her husband in that all such testimony was immaterial and irrelevant to any issue in this cause.

11. The Court erred in receiving in evidence over objection of respondent, and giving consideration to testimony of said Mrs. Ann B. Henderson as to various conversations between Mrs. Ann B. Henderson and respondent during the course of the trial of said Foshay case, in that all such testimony was immaterial and irrelevant to any issue in this cause.

12. The Court erred in requiring respondent to answer on cross examination as to statements alleged to have been made by respondent in the course of the deliberations of the jury in said Foshay case in that all such testimony was irrelevant and immaterial, dealt with subject-matter concerning which respondent had not testified on her direct examination, and was in violation of the privilege of respondent.

13. The Court erred in receiving in evidence in rebuttal over objection by respondent, and giving consideration to testimony of Mathilda Amundson as to statements alleged to have been made by respondent on September 1, 1931, prior

to her examination as a prospective juror in said Foshay case, in that such testimony was not proper rebuttal testimony.

14. The Court erred in receiving in evidence in rebuttal over objection by respondent, and giving consideration to testimony of said Andrew Farber, said Peter A. Peterson and said George A. Dahl to the effect that on one occasion during the trial of said Foshay case, before the jury retired to consider their verdict, respondent and her husband were talking together while the woman bailiff in charge of respondent was from 30 to 40 feet away, in that all such testimony was not proper rebuttal testimony, and was irrelevant and immaterial to any issue in this cause.

152 15. The Court erred in denying respondent's motion at the close of the trial to strike all evidence from the record which had to do with statements made in the jury room after the jury retired in said Foshay case.

16. The Court erred in denying respondent's motion at the close of the trial to strike out all testimony relating to transactions and statements made subsequent to the examination of respondent on September 1, 1931, except such testimony as might bear upon what was said by respondent after that date outside of the jury room in said Foshay case.

17. The Court erred in denying respondent's motion at the close of the trial to dismiss the petition and rule to show cause on the ground that it appeared from the petition and the evidence that the Court had no jurisdiction to punish respondent for contempt.

18. The Court erred in denying respondent's motion at the close of the trial to find respondent not guilty of contempt on the ground that the evidence would not support a conviction for contempt.

19. The Court erred in finding as a fact that before respondent was examined as a juror in said Foshay case she "made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her" in that such finding is not sustained by the evidence.

20. The Court erred in finding that respondent "at the time of her examination, did have in mind that she had worked for the Foshay Company in the summer of the year 1929; * * * that she deliberately and intentionally concealed her association with the Foshay Company when she was examined by the

Court"; that "her deceiving answers to the Court's questions disarmed the Court"; that respondent "purposely im-
153 plied in her answers to the Court's questions that her employment as a stenographer was limited to the period prior to her marriage"; that she "purposely withheld from the Court her employment after her marriage with the Foshay Company"; that "her failure to make the disclosure and her cunningly framed answers constituted an intentional concealment of a material matter"; in that none of such findings are sustained by the evidence.

21. The Court erred in finding as a matter of law that respondent's failure to disclose to the Court on her examination as a prospective juror in said Foshay case that she had been employed for a short period in 1929 by the Foshay Company constituted contempt of court.

22. The Court erred in finding respondent guilty of contempt of court for failing to disclose that she had been employed by the Foshay Company, when she had not been asked that question, and when the only charge against her in the petition or information was that she was guilty of contempt of court for having committed wilful perjury.

23. The Court erred in finding that respondent committed perjury upon her voir dire as a juror in said Foshay case in the following answers which respondent made to the following questions:

"Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?

A. Yes, I do feel that way.

* * * * * * * * * *

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes, I do."

in that such finding of fact is not sustained by the evidence.

24. The Court erred in finding as a matter of law that the answers of respondent set forth in the next preceding assignment constituted a contempt of court.

25. The Court erred in sentencing respondent to six (6) months in jail and to pay a fine of $1,000.00, in that a
154 sentence of both fine and imprisonment for contempt of court is in violation of Section 385 of Title 28 of the United States Code.

26. The Court erred in sentencing respondent as specified

in the next preceding assignment in that the sentence imposed, in view of the findings of the Court, is unduly harsh, and in imposing such sentence the Court exceeded the reasonable discretion it is allowed by law in contempt cases.

Wherefore, respondent prays that the sentence and judgment of the United States District Court, District of Minnesota, Fourth Division, be reversed.

SIGURD UELAND,
Attorney for Respondent,
800 Security Building,
Minneapolis, Minnesota.

Filed in the District Court Jan 29, 1932.

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155 (Order Allowing Appeal.)

On motion of Sigurd Ueland, Esq., attorney for Genevieve A. Clark, respondent herein,

It is ordered, that the appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered in the above entitled cause be, and the same hereby is allowed; that citation issue; that a certified transcript of the record, bill of exceptions, and all proceedings in the above entitled cause be forthwith transmitted to said United States Circuit Court of Appeals; that the bond for costs presented by respondent be, and the same hereby is approved; that execution of said judgment and all proceedings in this Court, except the settlement and allowance of the bill of exceptions, be stayed until the decision of said Circuit Court of Appeals for the Eighth Circuit on the appeal of the above entitled cause, and until the coming down of the mandate in this cause; that until the coming down of such mandate and the expiration of any stay which has been or may be granted by the Court said Genevieve A. Clark shall be at liberty on the recognizance heretofore filed by her in this cause.

It is further ordered, that with reference to the above entitled cause the term of this Court at which judgment in said cause was rendered be, and the same hereby is extended
156 until thirty (30) days after the coming down of the mandate as aforesaid.

Dated January 29, 1932.

GUNNAR H. NORDBYE
JOHN B. SANBORN
United States Judges.

Filed in the District Court Jan 29, 1932.

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157 (Appeal Bond.)

Know all men by these presents, that we, Genevieve A. Clark, as principal, and Rowland Arundel and William J. Rice, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars ($500.00), for which payment well and truly to be made we bind ourselves, our heirs, legal representatives and assigns firmly by these presents.

Signed, sealed and delivered this 28th day of January, 1932.

Whereas, in the above entitled cause judgment was rendered against the said Genevieve A. Clark, said judgment being entered on December 26, 1931, and said Genevieve A. Clark has appealed from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit;

Now, therefore, if said Genevieve A. Clark shall prosecute said appeal to effect and answer all costs awarded against her, then the above obligation shall be void, otherwise to remain in full force and effect.

GENEVIEVE A. CLARK
ROWLAND ARUNDEL
WILLIAM J. RICE

In Presence of:
MARCUS G. SUNDHEIM
MINDA S. HOLMES

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158 State of Minnesota,
County of Hennepin—ss.

On this 28th day of January, 1932, before me personally appeared Genevieve A. Clark and Rowland Arundel and William J. Rice, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

MARCUS G. SUNDHEIM
(Notarial Seal) Notary Public, Hennepin County, Minn.
My Commission expires August 21, 1935.

State of Minnesota,
County of Hennepin—ss.

We, Rowland Arundel and William J. Rice, the sureties described in and who executed the foregoing bond, being duly sworn, upon oath do say, each for himself, that he is a resident of and free holder in said state of Minnesota, and worth the sum of five hundred dollars ($500.00) above all debts and lia-

bilities, and exclusive of his property which is exempt from execution.

ROWLAND ARUNDEL
WILLIAM J. RICE

Subscribed and sworn to before me this 28th day of January, 1932.

MARCUS G. SUNDHEIM
(Notarial Seal) Notary Public, Hennepin County, Minn.
My Commission expires August 21, 1935.

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159 The within appeal bond is hereby approved this 29th day of January, 1932.

GUNNAR H. NORDBYE
Judge of United States District Court.

Filed in the District Court Jan 29, 1932.

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160 (Notice of Appeal.)

To the Honorables John B. Sanborn and Gunnar H. Nordbye, district judges, the clerk of the above entitled Court, Fred Horowitz, Esq., special assistant to the attorney general; L. L. Drill, Esq., United States attorney, and Robert V. Rensch, Esq., assistant United States attorney:

Please take notice, that Genevieve A. Clark, respondent in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the sentence and judgment entered in said cause on the 26th day of December, 1931, and from the whole thereof.

Dated this 30th day of January, 1932.

SIGURD UELAND,
Attorney for Genevieve A. Clark,
Respondent.

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161 Admission of service of the within notice of appeal admitted this 30th day of January, 1932.

L. L. DRILL, U. S. Atty.
FRED HOROWITZ, Spec.
Asst. Atty. Genl.
Attorneys for the Government.

Filed in the District Court Jan 30, 1932.

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162 (Citation.)

United States of America—ss.

To the United States of America, Greeting:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the city of St. Louis, Missouri, forty (40) days from and after the date this citation bears date, pursuant to an appeal allowed and filed in the office of the clerk of the United States District Court, District of Minnesota, Fourth Division, wherein Genevieve A. Clark is appellant and United States of America is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorables John B. Sanborn and Gunnar H. Nordbye, judges of the United States District Court, District of Minnesota, this 29th day of January, A. D. 1932.

GUNNAR H. NORDBYE
JOHN B. SANBORN
United States District Judges.

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163 Admission of service of the within citation admitted this 30th day of January, 1932.

L. L. DRILL, U. S. Atty
FRED HOROWITZ, Spec.
Asst. Atty. Genl.
Attorneys for the Government.

Filed in the District Court Jan 30, 1932.

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164 (Stipulation Designating Portions of the Record to be Included in the Transcript.)

It is stipulated that the transcript of the record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to an appeal allowed in the above entitled cause shall include the following and no other papers or exhibits, to-wit:

(1) Petition for rule to show cause;
(2) Rule to show cause;
(3) Answer to petition and rule to show cause;
(4) Bill of exceptions;
(5) Decision and judgment;
(6) Petition for appeal;
(7) Order allowing appeal;

(8) Assignment of errors;
(9) Cost bond on appeal;
(10) Citation;
(11) Notice of appeal;
(12) This stipulation for transcript of record;
(13) Notice of election with reference to printing transcript of record.

Dated February 11th, 1932.

SIGURD UELAND
Attorney for Appellant
L. L. DRILL F H
FRED HOROWITZ Spec
Asst Atty Genl
Attorneys for Appellee

Filed in the District Court Feb 13, 1932.

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165 (Election as to Printing Record.)

Respondent and appellant Genevieve A. Clark files this her notice of election to file in the United States Circuit Court of Appeals for the Eighth Circuit a printed transcript of the parts of the record as may be designated for the hearing of this cause upon appeal to that court pursuant to the provisions of the act entitled "An act to diminish the expense of proceedings on appeal and writ of error or of certiorari," approved February 13, 1911.

SIGURD UELAND
Attorney for Said Respondent and Appellant.

Filed in the District Court Feb 13, 1932.

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166 (Clerk's Certificate to Transcript.)

United States of America,
District Court of the United States,
District of Minnesota, Fourth Division.

I, Joel M. Dickey, clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 165 pages, numbered consecutively from 1 to 165, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein the United States of America is plaintiff, and Genevieve A. Clark is defendant, and of the whole thereof (except as modified by the stipulated

praecipe of said parties to be found at page 164 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify that I have annexed to said transcript and included within said paging the original citation, together with proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Minneapolis in the District of Minnesota, this 17th day of February, A. D. 1932.

Seal
U. S. District Court,
Fourth Division,
Dist. of Minnesota.

JOEL M. DICKEY,
Clerk,
By Thomas H. Howard, Deputy Clerk.

120 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals for the Eighth Circuit.

Genevieve A. Clark, Appellant,
No. 9457 vs.
United States of America, Appellee.

The Clerk will please enter my appearance as the attorney for the appellant.

SIGURD UELAND,
800 Security Building,
Minneapolis, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 29, 1932.

(Appearance of Mr. Lewis L. Drill and Mr. Robert V. Rensch as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
United States Attorney,
P. O. Building,
St. Paul, Minnesota.

ROBERT V. RENSCH,
Assistant U. S. Attorney,
P. O. Building,
St. Paul, Minnesota.

121 (Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 4, 1932.

(Appearance of Mr. Fred Horowitz as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

FRED HOROWITZ,
Special Assistant to the Attorney General, 502 Union Bank Bldg., L. A. Cal.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 25, 1932.

(Order of Submission.)

May Term, 1932.

Thursday, May 26, 1932.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Sigurd Ueland for appellant, continued by Mr. Fred Horowitz for appellee and concluded by Mr. Sigurd Ueland for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

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122 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 9457.—October Term, A. D. 1932.

Genevieve A. Clark, Appellant,
vs.
United States of America, Appellee.

Appeal from the District Court of the United States for the District of Minnesota.

Mr. Sigurd Ueland for appellant.

Mr. Fred Horowitz, Special Assistant to the Attorney General (Mr. Lewis L. Drill, United States Attorney, was with him on the brief), for appellee.

Before Stone, Kenyon and Gardner, Circuit Judges.

Kenyon, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment of the District Court entered on the 26th day of December, 1931, adjudging appellant, Genevieve A. Clark, guilty of contempt, and imposing as punishment confinement in the county jail of Ramsey County, Minnesota, for a period

of six months and payment of a fine of $1,000.00. As we hereinafter fully discuss the facts it will be necessary at this point merely to refer briefly to some of them.

Appellant on August 24, 1931, was summoned to report on September 1, 1931, as a juror in the United States District Court at St. Paul, Minnesota. The case for which she was summoned was that of *United States* v. *W. B. Foshay, Palmer V. Mabry, et al.*, a somewhat celebrated mail fraud case (which will be referred to hereinafter as the Foshay case). She did not know at the time of the summons for what particular case she was called. Within a day or two after the receipt of the summons she telephoned her sister who worked in the Federal Building at St. Paul about being called on the jury, and discussed with her the question of postponement of her service on account of expecting a friend to visit her during the week of September 1st. In one of the telephone conversations with her sister she was advised that the case she was called upon was the Foshay case. She was also advised by her sister that she would probably be disqualified because she had been employed by Foshay & Company, a corporation in which a number of the defendants were interested. Appellant had been married to one D. D. Clark in January, 1921. He was President of the Citizens State Bank of St. Paul from January, 1921, until August, 1925, when at the request of the State Banking Department he agreed to resign. Prior to her marriage she had been employed in the bank as a stenographer, and so continued for a time after her marriage. Appellant had been employed by the Foshay Company for some two weeks in the summer of 1929. She was not acquainted with any of the defendants. In the years 1922 and 1923 her husband had some business transactions with defendant, W. B. Foshay. The record contains a number of letters written back and forth between Foshay as President of the W. B. Foshay Company, and her husband as President of said Citizens State Bank, which show rather intimate business relations between them. Her husband at the time of the trial was a member of the real estate firm of Willie & Clark, having left the service of the bank some time previous thereto. One of the defendants, Mabry, transacted business with said Citizens State Bank from 1917 until 1925, and was acquainted with appellant's husband. Prior to appellant's examination on the voir dire she talked with some women who were also summoned for service on the panel. These women testified on the hearing for contempt that she made statements that she wished to serve on the jury and that she had a

special reason for wanting so to do, and was afraid that her former employment by the Foshay Company would disqualify her. Judge Molyneaux conducted the examination of the jurors on the voir dire, and appellant during said examination was asked questions and gave answers as follows:

"Q. Have you yourself ever been in any business of any kind?
A. I have been a stenographer before my marriage, yes.
Q. In what kind of business did you work?
A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency."

She testified further that after the summons she discussed with her husband the probability of being on the jury; that she had formed no opinion thereon and did not know the lawyers of defendants. The following also occurred on this examination:

"Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?
A. Yes, I do feel that way.
Q. Did you ever sit on a jury before?
A. No, sir.
Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?
A. Yes, I do."

She was accepted and sworn as the final juror.

Evidence was introduced in the contempt hearing by other jurors as to her conduct in the jury room, and certain statements she made before the jury when it was deliberating, on the theory that they tended to show bias and prejudice at the time of her examination. We refer to them hereinafter. Appellant's husband visited her about once a week during the course of the trial before the jury retired to consider its verdict. She claims to have talked to him only while Mrs. Henderson, a bailiff, was present. Mr. Clark did not testify in the present hearing. She expressed a desire before the jury to talk to her husband, that "she would like to have his opinion—how he would vote." In the jury room she discussed the evidence but little.

The trial of the case lasted about seven weeks. The jury was out approximately one week, being discharged on Oc-

tober 23, 1931. It stood from the commencement of its balloting eleven for conviction and one (appellant) for acquittal. The Government instituted an investigation of the circumstances surrounding this trial under which appellant became a member of the jury. On November 3, 1931, Mr. Horowitz, counsel for the Government, Post-office Inspectors, Schriver, Simmons and Hugdal, and the court reporter, Mr. Ackerman, called upon appellant and her husband at their home. Stenographic notes of what transpired were taken, and were used on the cross-examination of Mrs. Clark.

On November 4th a petition was filed in the District Court charging appellant with criminal contempt, and a rule to show cause was issued thereon returnable November 9, 1931. On that day appellant filed a sworn answer denying the charges of the petition for the rule. Additional time to prepare for trial was asked, but the court proceeded to hear witnesses on behalf of the Government, and then granted a continuance for ten days to enable appellant to prepare her defense.

The case was heard by two District Judges, Sanborn (now Circuit Judge) and Nordbye. A written opinion was filed in which the Court said:

"The evidence does conclusively establish that Mrs. Clark, at the time of her examination, did have in mind that she had worked for the Foshay Company in the summer of the year 1929. She had been informed by her sister that that fact would probably disqualify her as a juror in that case. Her discussion with other prospective jurors clearly indicates that she herself was apprehensive that such employment would prevent her from being accepted as a juror. We are convinced that she deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court."

Also as to her answers concerning freedom from bias and prejudice:

"* * * * * * it is our opinion that Mrs. Clark purposely withheld information from the Court so as to be accepted as a juror. Her remarks to her fellow prospective jurors as to her desire to be accepted on the panel and that she had a special purpose in mind, may without any other circumstances, be quite consistent with an honest rather than a wicked intent. Her studied attempt, however, to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror."

It is the contention of appellant that she has been convicted of something claimed to constitute contempt, of which she was not accused; that she was charged with perjury and the same was not proved; that the court misapprehended the nature of contempts; that the court erred in receiving evidence of deliberations in the jury room; erred in permitting cross-examination of appellant in respect to what she said and did in the jury room; that it was denial of due process of law to proceed to trial on the return day; that the sentence is excessive; that it was error to sentence appellant to both fine and imprisonment.

It thus appears that many important questions are raised by the assignments of error.

Counsel for appellant in his brief states "the startling fact is that appellant has been convicted of something claimed to constitute a contempt of which she was not accused." The seriousness of this charge challenges our first attention.

We agree with the argument of counsel that the contempt, if any, was what the law regards as a "constructive" contempt, rather than a "direct" one.

The alleged contempt, while within the presence of the court, could not be known to the court in its judicial knowledge or observation, and hence there could not be summary punishment. The proceeding here was the proper one, and due process of law entitled appellant to be informed of the alleged contempt and of what it consisted, and to a reasonable opportunity for preparation of her defense; also to be represented by counsel and to immunity from self-incrimination. *Cooke* v. *United States*, 267 U. S. 517. Contempt proceedings have many times been said by the courts to be sui generis. The accusation does not require the same particularity as an indictment. It is sufficient if it fairly advise an alleged contemnor of the offenses with which he is charged so as to enable him to prepare properly his defense thereto. In *Aaron* v. *United States*, 155 F. 833, 836, this Court said: "It is now the recognized rule that the information in a contempt proceeding is sufficient if it clearly apprises the defendant of the nature of the charge against him, and no particular form is necessary." In *Myers* v. *United States*, 264 U. S. 95, the Court said: "contempt proceedings 'are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms.' The cases cited by plaintiffs in error in support of this contention deal with indictments in criminal cases and are not in point. 'There is no fixed formula for contempt pro-

ceedings, and technical accuracy is not required.' " In *Ex parte Grossman*, 267 U. S. 87, 117, the Court said: "Contempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction." In *Kubik* v. *United States*, 57 F. (2d) 477, this Court recognizes and approves the doctrine that in contempt proceedings the information is sufficient if it clearly informs defendant of the charge, and in a recent opinion, *Conley et al.* v. *United States* (filed May 25, 1932), this Court sustains an information for contempt less informative than the one here under discussion. See also *Armstrong* v. *United States*, 18 F. (2d) 371; In *Savin, Petitioner*, 131 U. S. 267; *Ex parte Hudgings*, 249 U. S. 378; *Hagner* v. *United States*, 285 U. S. 427.

The entire record may be examined by a reviewing court to determine whether an alleged contemnor has been sufficiently informed of the charges against him. *Schwartz* v. *United States*, 217 F. 866; *Blackmer* v. *United States*, 49 F. (2d) 523; *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418.

Was appellant here sufficiently advised of the charges against her? Of course from the questioning of her husband and self by Government officers before the accusation was filed she knew that her conduct as a juror was being investigated, and that she was being accused of falsification in her answers to questions put to her by the District Court, but what did the petition for the rule which was served upon appellant tell her? It charged that she wilfully, corruptly, and contrary to her oath, did falsely swear and depose before said court in answer to questions put to her by the presiding Judge in the criminal indictment trial against the defendants, Foshay et al. It called especial attention to her answers as to her being in business before she was married, and that her mind was free and open, that she was not biased either one way or the other and would base her judgment on the law and evidence as given by the court. It then stated:

"* * * * * whereas, in truth and in fact it was not and is not true and at the time of so swearing and deposing the said Genevieve A. Clark did not believe it to be true that she, the said Genevieve A. Clark, had been in business but that was before she was married and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency, and that it was true that since her said marriage she was employed by the said Citizens State Bank of St. Paul, and other con-

cerns, and as late as July, 1929, was employed by the said W. B. Foshay Company, a corporation;

* * * * * * * * *

And whereas, in truth and in fact it is not true and at the time of said swearing and deposing the said Genevieve A. Clark did not believe it to be true that her mind was free and open; that she, the said Genevieve A. Clark, was not biased either one way or the other and would try to follow the evidence and would base her judgment on the evidence and the law as given by the Court; and that it is true that her mind was not free and open and that she was biased and would not try to follow the evidence and base her judgment on the evidence and the law as given to her by the Court in that she was determined at the time she did so swear and depose that regardless of the evidence and the law that she would vote not guilty as to each and all of the defendants."

And the petition further asserts:

"And the said Genevieve A. Clark, in the manner and form aforesaid, having taken an oath before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and contrary to her said oath, did depose and state material matters which she did not then believe to be true and did then and there commit wilful and corrupt perjury; and the due administration of justice, in the selection of a jury, and in the trial of said Foshay case in this Honorable Court was in fact thereby corruptly and unlawfully impeded and obstructed."

It then prays that she be required to appear to show cause:

"why she should not be held in contempt of this Honorable Court in consequence of her said contemptous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt; * * * *"

The rule required her to appear and show "why she should not be adjudged in contempt of the authority of this Court as prayed in said petition."

There is no real difference between the statement she was accused of making "That she, the said Genevieve A. Clark, had been in business, but that was before she was married," and the statement the evidence says she actually made, "I have been a stenographer before my marriage, yes," which was in answer to the question, "Have you yourself ever been in any business of any kind?"

Appellant argues that she was charged with perjury, that perjury was not proved, and hence the Government has failed in its proof. It is true the petition charges her with perjury, and we may assume that what she did may not amount to perjury, but she was accused of "contemptuous and obstructive conduct" so that even if the conclusion of the accusation was that perjury was committed, it is obvious that all the facts were stated upon which was based a charge of contempt.

The general rule as to proof of perjury as laid down by the Supreme Court in *Hammer* v. *United States*, 271 U. S. 620, and other cases, makes most difficult its successful prosecution.

The Government here elected to proceed for contempt and not for perjury—doubtless having in mind the difficulty of conviction of perjury.

The essence of the offense charged was contempt rather than perjury, and as falsification or evasion which may fall short of perjury may constitute contemptuous conduct if its tendency is to obstruct the administration of justice, the allegation of the petition that appellant's answers constituted perjury is an immaterial allegation, and she stands thereunder charged with the exact offense of which she was convicted.

The gist of criminal contempt is the obstruction of the administration of justice. The gist of perjury is falsification under oath.

In *Ex parte Hudgings*, 249 U. S. 378, it was held that technical perjury does not constitute criminal contempt within the meaning of section 268 of the Judicial Code unless it amounts also to an obstruction to the administration of justice, and impliedly it can be drawn from that case that less than technical perjury may constitute criminal contempt if it amounts to an obstruction in the administration of justice even though certain elements of perjury be lacking. *In re Nunns*, 176 N. Y. S. 858, 870, the Court said: "I perceive no logic in the proposition that the commission of perjury is essential to a contempt by false answers." In *Young* v. *State*, (Ind.) 154 N. E. 478, 479, the court said: "Ordinarily, false swearing by a witness is held to be such an obstruction of justice as to constitute a direct contempt of court. 13 C. J. 25, #31. It is not necessary that the false testimony upon which the charge of contempt is based constitute perjury." Of course *Young* v. *State*, and *In re Nunns*, *supra*, were not decisions under the federal contempt statute, but on the question that there may be a contempt of court if the false

swearing, though not amounting to perjury, in fact amounts to an obstruction of justice, they are in point. We are satisfied the accusation was sufficient to fully acquaint appellant with the charges against her.

The presumption of innocence obtains in a proceeding of this nature and the triers must be satisfied beyond a reasonable doubt of the guilt of the accused. *United States* v. *Carroll*, 147 F. 952; *Oates* v. *United States*, 233 F. 201; *Kelly* v. *United States*, 250 F. 947; *United States* v. *Dachis*, 36 F. (2d) 601; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Michaelson* v. *United States*, 266 U. S. 42. For acts to be punishable as contempt under section 268 Judicial Code (28 U. S. C. A., section 385) this court has held in *Froelich* v. *United States*, 33 F. (2d) 660 (no question of perjury involved) that it is not necessary they shall have actually obstructed or impeded the administration of justice. If they have a tendency so to do they are sufficient. See also *Toledo Newspaper Company* v. *United States*, 247 U. S. 421.

Is there substantial evidence to sustain the finding of the trial court as to criminal contempt?

When Mrs. Clark received her summons to serve as a juror she said at her home that she had not wanted to get on the jury but had wanted to be free that week—"absolutely free;" that "I did not know that it was the Foshay jury that I was called for. I did not know that until I got down into the Court room." Her sister, Mrs. Brown, testified at the trial that she had two telephone conversations with her sister after the summons had been served. In the first one Mrs. Clark informed her that she was expecting a visitor for the week of September 1st, and asked if she knew of any way she could get a postponement or get excused. A day or so later Mrs. Brown called her up on the phone telling her she had consulted the Clerk's office as to what she (Mrs. Clark) should do if she wanted to be excused, and that they suggested that she appear in court. Mrs. Brown said:

"I told my sister that I had been to the clerk's office, and that that was what I was told, that she should appear in Court that day if she wanted to be excused or to get a postponement. I said also that she might—that they might not reach her name, because there was such a large panel. I told her then that I had heard that it was to be the Foshay case. And that that would probably disqualify her. I think that was all. I said I believed that she should see the Court on the day of the summons.

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"I told my sister because of the matter of her employment there, that that would naturally disqualify her. She said it probably would, I believe. When I said it would probably disqualify her, I told her, why, I thought it would probably disqualify her.

I did not discuss the Foshay Company over the telephone. I knew my sister had been employed here."

Parts of the conversation testified to by Mrs. Brown were not remembered by appellant. The trial court evidently believed Mrs. Brown. Appellant attempted to explain her statement as to not knowing she was called for the Foshay jury until she got into the court room, which was directly contrary to the evidence of her sister, by saying her purpose was to shield the person who had given out the information from the clerk's office. At the court house on September 1st appellant talked with Mrs. Passer, who had also been called for jury service. The witness testified that Mrs. Clark told her

"that she had worked in the Foshay Building, but that she was sure that would not disqualify her for jury service. Mrs. Clark said that she was simply praying to serve as a juror in that particular case. I asked her why she would want to serve on a case that would last so long, and she said that she had a very special reason, but she did not state it. No, she did not state the reason. I told Mrs. Clark that I was very much surprised that we were summoned as jurors in the Foshay case, because I had not known of it until I arrived in court, and she told me that she knew two weeks before that she was called on the Foshay jury panel."

Some of the statements of Mrs. Passer appellant could not remember—some of them she denied. It is argued here by appellant's counsel that Mrs. Passer was a seriously discredited witness, because according to her testimony she and Mrs. Clark discussed the Foshay case at some length, and when Mrs. Passer was examined she said that she had not mentioned it to a soul. What she testified was that she talked relative to court procedure and did not talk about the Foshay case. Be that as it may, the trial court evidently thought her credibility was not seriously affected by this.

To Mrs. Johnson, another woman who was summoned for jury service in the Foshay case, Mrs. Clark, while they were waiting to be called, stated that "she had been a stenographer," and "had done stenographic work for about two weeks for the Foshay Company, since she was married," and "wondered if it would disqualify her."

Mrs. Anderson, who was also a prospective juror, had some conversation in the court room with Mrs. Clark on September 1st. She testified:

"Well, I had very little conversation with Mrs. Clark. I only just expressed my opinion, that I really did not know if I would like to serve on a jury of this kind or not, and Mrs. Clark's answer was that she would like to serve, but thought probably she would not be accepted on account of working there. Just working for the parties, working there. That is just what she said. That's all the conversation we had. That was the extent of the whole conversation."

It is apparent that before the examination of Mrs. Clark on the voir dire by Judge Molyneaux she had in her mind the fact that she had been employed by the Foshay Company since her marriage and that such employment might disqualify her. She entered upon the examination with such opinion from her sister. The matter was so much on her mind that she talked to three women who were there awaiting their examination on the voir dire about it, prior to being questioned. She had come to the court room with her husband, who, while he was President of the Citizens State Bank of St. Paul, had done business with Foshay, and also with another of the defendants, Mabry. She had discussed with her husband the possibility of her being on the jury, but said she did not then know it was the Foshay jury. She testified that she was nervous when examined, as might be natural, having been only twice in court before and that a traffic court. However, she was a woman who had had much experience in the business world, i. e., as a stenographer for years, as an assistant cashier for two years, signing drafts and cashier's checks, and at times assisting in the teller's cage, drawing minutes of bank meetings in the bank of which her husband was President, and having charge of the insurance department thereof. She had a high school and business college education. The record shows she was a woman of ability and wide business experience.

The court examined her for the purpose of finding out her connections in any way that might affect her fairness as a juror, so as to give opportunity either for peremptory challenges or challenges for cause. The question to be determined was as to her qualifications to take part in the trial, an exceedingly important question. The court and counsel were entitled to know what her relationship to the entire situation was. She was asked concerning her husband's business and where he had his office. She does not seem to have been frank in telling of her husband's business or place where it was car-

ried on. The court asked her, "Have you yourself ever been in any business of any kind?" That was a clear question sufficient to arouse appellant's attention and direct it to the information sought by the question to be elicited, and required a candid and fair answer. Her answer, "I have been a stenographer before my marriage, yes," was misleading and disarming. The court then asked, "In what kind of business did you work?" and she answered, "Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency." Her testimony was as misleading as an absolute falsehood, for these two answers taken together conveyed to the court the idea that she had been a stenographer before her marriage and not thereafter; that the employment with the Nash agency had been before her marriage, which was not true, and that these employments represented all the business in which she had ever been engaged. It is contended that she had in mind permanency of employment. If this be true, how did she happen to remember her employment with the Nash agency, which was of no longer duration than her employment with the Foshay Company, and was some time before.

With what possible theory of innocence can the fact be reconciled that she remembered the employment with the Nash agency, which had occurred more than six years before, but forgot the employment with the Foshay Company, which had occurred but a little over two years before, which she as a reasonable human being must have known was so much more material and relevant to the inquiry then proceeding, and about which she had so recently talked in language that bespeaks a complete understanding of its materiality and relevance, with her sister and with three other persons?

It is apparent that she feared her employment with the Foshay Company if known might result in disqualifying her as a juror. If she had been desirous, as she had stated at her home, of not serving on the jury, here was her opportunity to be excused. It is certain from this situation that the thought uppermost in her mind was to conceal the fact that she had been employed with the Foshay Company and thus carry out the wish she had expressed to serve as a juror in this particular case where Foshay and Mabry, business friends of her husband, were defendants. Of course counsel might have pursued the matter further and possibly have developed her previous relationship with the Foshay Company, but that is not a defense to her actions.

As to the questions asked her as to whether her mind was open and free and whether she was biased one way or another, which we

have heretofore set out, her answers thereto were evidently false, and the record shows she was so deeply prejudiced that she could not fairly serve as a juror. The motive for her prejudice does not appear, but that is immaterial if she had such prejudice and bias that she could not base a verdict upon the evidence and the law. Considering together her statements and conduct prior to her examination by the court and after being sworn as a juror, it is shown we think beyond any reasonable doubt that she had some reason for wanting to become a juror entirely inconsistent with an unprejudiced and unbiased mind and inconsistent with any intention to base her verdict solely upon the evidence and the law as given to her by the court. There is no theory observable to us by which her statements as to freedom from prejudice or bias could be made to appear truthful. Some of the statements alleged to have been made in the examination that was conducted of herself and husband by representatives of the Government appellant denies, others she admits, others she does not remember. It is strange that during the time she was being examined for the jury the fact that she had worked for the Foshay Company never came into her mind, and she did not think of it until that evening at the hotel when she seriously wondered, as she testified, if she should not go into court the next day and tell Judge Molyneaux. She says that she went over it and over it. That fact so carefully concealed by her on her examination was disturbing her but she did not ease her conscience by telling Judge Molyneaux the next day. That her answers as to her employment were merely evasive and not absolute falsehoods is no defense. Evasive answers of a juror on the examination on the voir dire may be just as obstructive to justice as absolutely false answers. Truth is often hidden behind the subterfuge of evasion.

The general rule, and the one followed in the federal courts, is best stated in *O'Connell* v. *United States*, 40 F. (2d) 201, where the defendant was adjudged in contempt "by reason of his attitude as a witness before the grand jury, in not answering or answering evasively questions propounded to him," and where the court said at page 204: "Since *Ex parte Hudgings*, 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656, 11 A. L. R. 333, we have held that, though a witness make formal answer, it may be apparent that he is withholding the truth, and that such obstruction of justice may be punished as contempt even if it be also perjury." In *Loubriel* v. *United States*, 9 F. (2d) 807, though a conviction for contempt was there reversed on the facts, it was said, at 808: "The question is no less than whether courts must put up with shifts and subterfuges in the place

of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance. We have not the least doubt of the power of the District Court to punish a witness for an evasion patently put forward to avoid his duty. No doubt, since its exercise is drastic, it is to be used with caution, but at times no other means exists to prevent an entire miscarriage of justice. Of its limitations we shall have more to say."

The case of *Pearcy* v. *Michigan Mut. Life Ins. Co.*, (Ind.) 12 N. E. 98, discusses propositions similar to those before us. The jurors were asked on the voir dire the question, "Do any of you hold a policy of life insurance issued by the defendant, the Michigan Mutual Life Insurance Company?" This juror answered "No." He had taken out a policy with that company upon his own life payable to his wife, the policy being an old line one in which legal title became vested in a beneficiary. The Supreme Court of Indiana reversed a judgment on the verdict and remanded the case for a new trial, and it said many things. It referred to the twofold purpose of an examination of a juror on his voir dire and the importance of a party knowing the relationship of the person called as a juror to his adversary for the purpose of enabling him to challenge either for cause or possibly peremptorily, and refers to the duty of a juror to fully answer the questions, not concealing any material matter in order that the knowledge may be present to intelligently exercise challenges. The Court said:

"* * * * A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation, or concealment.

We think that the question asked the juror required him to answer as to the policy taken out on his own life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which the appellee maintains it was. It was not incumbent upon the appellee to minutely cover, by a long series of specific questions, all phases of the subject, but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems

clear that such a question as that asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife; for the question certainly indicated that information as to his interest in the company, as well as his connection with it, was sought by the counsel conducting the examination.

The authorities support our conclusion that if the general question fairly arouses the juror's attention, and directs it to the information desired, it is enough, without specific questions covering minute phases of the subject.

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But we need not and do not decide whether the interest of Bowman was such as would have warranted a challenge for cause, for it is enough for the present to decide that the information sought by the question was relevant and material for the purpose of enabling the appellant to intelligently exercise her right to interpose a peremptory challenge."

Counsel for appellant in referring to this case points out that the falsification of the juror was not made the basis of a criminal proceeding for contempt, but was merely recognized as a ground for a new trial. That is true. However, the court spoke of the juror as being "guilty of misconduct" and such misconduct as requires a new trial would apparently be an obstruction to the administration of justice. The misconduct in the case we are considering caused some eight weeks of the time of the court, prosecuting officials and jurors to count for naught.

The questions asked appellant on the voir dire as to her employment and her bias or prejudice were highly material. What could be more material to the whole purpose of the voir dire than to seek to ascertain that the prospective juror is free from bias and prejudice and intends to rest his verdict solely on the evidence and the law as given to him by the court, and to seek out such facts of the juror's business relationships as would bear upon his qualifications as a juror in the particular case about to be tried? Specifically one's employment by the company whose chief members are on trial for frauds committed in the conduct of its business is as material to qualifications as a juror as would be ownership of a policy of life insurance issued by a defendant company. *Pearcy* v. *Michigan Mut. Life. Ins. Co., supra.* And the fact that the duration of the employment was short, and its character minor, would no more de-

tract from its materiality than would the fact that the insurance policy in the above case may have been of small amount.

It is urged with much force that there was no proof of corruption, or of a motive, and that if appellant intended to conceal her employment by the Foshay Company she would not have told that fact to three women in the court room just prior to her examination. The latter cuts both ways. She did not attempt to conceal the fact from the three women but carefully concealed it from the court. It is true there is no evidence of corruption, but that is not conclusive, although of course an important fact. It is also true that no real motive for such prejudice has been shown to exist. But her motive for prejudice or bias is immaterial if in fact such prejudice or bias did exist. There might have been no real motive at all, or she might have been endeavoring to protect her husband's business friends, or the only motive might have been a general conviction that all criminal defendants are prosecuted unjustly and should therefore be acquitted; and, if in fact her mind was prejudiced or biased at the time she made the above answers, those answers would have been just as false and obstructive of justice as if she had had the most immediate and real of motives.

We can reach no other conclusion under this record than that there is substantial and sufficient evidence to sustain the finding of the trial court.

It is contended that appellant's sworn answer and testimony that she did not intend to mislead the court and that she answered truthfully with respect to her freedom from bias were conclusive. In other words, that the contempt was purged. Such is the common law rule of trial by compurgation, but this doctrine is a curious legal antique of past ages. In the present day people are not tried by oath, and this procedure is not the rule of the federal courts. It has been continuously renounced by them, and the sworn answer is not held as conclusive. If a party can purge himself by an answer under oath then as stated in *United States* v. *Shipp*, 203 U. S. 563, "all contemnors willing to run the slight risk of a conviction for perjury can escape."

In *Boyd* v. *Glucklich*, 116 F. 131, this court adverted to the common law rule of purgation in case of a constructive contempt, and seems to have approved it, but in a concurring opinion by Judge Sanborn he took the position as to proceedings for contempt for disobedience of orders in bankruptcy and in chancery, that "the sworn

answers of the party charged with the contempt are evidence to purge him thereof, but they are not conclusive evidence. They may be contradicted and supported by other testimony, and the question whether or not the party charged has purged himself of the contempt is always to be decided upon a careful consideration of all the evidence produced for and against him." We agree with Judge Sanborn and if contrary doctrine could be gathered from this case we would not be willing to follow it. In *United States* v. *Shipp*, 203 U. S. 563, Justice Holmes refers to this doctrine as a notion "an intrusion or perversion of the canon law." In the second appearance of that case in the Supreme Court, 214 U. S. 386, it was pointed out that in the former appeal it had been determined "that the answers of the defendants, under oath, disavowing intent did not purge them."

That the federal courts do not recognize the common law rule of purgation is well settled. They leave the question of the commission of a contempt to be determined by all the proof upon a hearing. *United States* v. *Carroll*, 147 F. 947; *Kirk* v. *United States*, 192 F. 273; *United States* v. *Huff*, 206 F. 700; *In re La Varre*, 48 F. (2d) 216; *Swepston* v. *United States*, 251 F. 205; *Bowles* v. *United States*, 50 F. (2d) 848.

We have thus far discussed this appeal on the theory that the evidence of jurors as to what was said by appellant in the jury room was competent evidence. We are now brought to the question of whether appellant was adjudged guilty upon the basis of evidence improperly admitted. This testimony was important as bearing on the motive of appellant in becoming a juror and her condition of mind when she stated that she could try the case without bias or prejudice. There is no doubt that much authority exists for the proposition that a juror cannot be heard to testify to statements made in a jury room by other jurors in the course of the jury's deliberations upon their verdict. The real basis of the doctrine is the principle of privileged communications. Some courts have said it is against public policy to permit a juryman to make an affidavit of anything that occurs in agreeing to a verdict, *Woodward* v. *Leavitt*, 107 Mass. 453, yet courts have not hesitated to set aside verdicts because of the misconduct of jurors, such as a juror bringing law books into the jury room and reading them to the jury upon points involved in the case, *Harris* v. *State*, (Neb.) 40 N. W. 317, and there are numerous instances of where verdicts have been set aside because the jurors agreed to be bound by a quotient verdict. Authority for appellant's

position on this question is undoubtedly found in *Wigmore's Treatise on Evidence*, where he discusses the matter at length, section 2285, Vol. 4, p. 3185, and states after reviewing the reasons for surrounding a juror with secrecy: "It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow-juror disclosed upon the witness-stand against his consent." Dean Wigmore draws a distinction between evidence of ordinary acts of misconduct of jurors and utterances, and places the basis of the exclusion of utterances not on the generally stated doctrine of self-stultification but on that of privilege. The States following what Wigmore terms the "Iowa rule" (*Wright* v. *Telegraph Co.*, 20 Iowa 195; *Cowles* v. *R. R. Co.*, 32 Iowa 515) make no distinction between ordinary acts and utterances. We call attention to a few of these. In *Harris* v. *State* (Neb.), 40 N. W. 317, 320, there is a most enlightening statement covering very clearly the question we are discussing. It is said:

"It is the well-established rule of law, as held in all courts, so far as we know, (unless the rule be changed by statute,) that affidavits of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to a matter which essentially inheres in the verdict itself, as that the juror was mistaken in a computation, or misunderstood a witness, or did not comprehend the instructions of the court. The reason for the rule is that, the matters referred to being alone within the breast of each juror, it would be impossible to rebut any statements which might be made by the juror. * * * * * * I think it may further be said that the rule adopted by the greater number of courts, both in this country and in England, is that affidavits of jurors will not be received in any case for the purpose of impeaching or avoiding their verdict; but to this there are a number of exceptions, and, to our mind, the opposite rule is much more reasonable and promotive of justice. This is confined to such overt acts as may be seen or heard, and about which all the jurors present may testify with equal knowledge. Thus, where a verdict for damages is ascertained by aggregation and division, without subsequent ratification; or where it is made to depend upon chance; or where a part of the jury become so intoxicated as to destroy their ability to deliberate and exercise reason and judgment; or where witnesses are surreptitiously called before them, and permitted to detail the principal facts; or where it appears that one of the jurors was familiar with the facts of the case, and by reason of his suppression of the fact of such acquaintance he procures himself to be accepted

as a juror, and in the jury-room asserts such knowledge, and assumes the role of both witness and advocate, and procures a verdict; and the like,—all of which being matters of sight and hearing, are susceptible of proof or contradiction by the testimony of others. In such cases we can see no danger in permitting proof of the facts by the affidavits of the jurors themselves."

In *Perry* v. *Bailey*, 12 Kansas 539, it is said by Mr. Justice Brewer:

"If the jury have been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury have been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the modern rule is to let the verdict stand, and simply punish the offending juror. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict should also be set aside."

In *Harris* v. *State, supra,* and also in *Richards* v. *State,* (Neb.) 53 N. W. 1027, the misconduct consisted in utterances, but in both cases the testimony was received for the purpose of impeaching the verdict. New York seems to hold similarly in *In re Nunns,* 176 N. Y. S. 858, where the facts are quite similar to the case at bar. There contemnor was a petit juror in a trial upon an indictment against parties for keeping a disorderly house. The jury acquitted the defendants and contempt proceedings were commenced. In reply to questions put to him on the voir dire the relator answered that he did not know the defendants or either of them and knew nothing of their place. He was accepted as a juror and sat through the trial. After the case was submitted he stated facts to the jurors, said that he knew the defendants and their place and that it was a correct and proper place. The court held that his answers on the voir dire were false; that his conduct was deliberate in the court room and in the jury room; that the proceedings of the jurors preliminary to the verdict, the talk, discussions, informal votes, etc. were inviolable for all time; that such actions inhered in the verdict and were merged in it, but that the conduct of the juror might be in violation of his oath; that this conduct did not "essentially inhere in the verdict itself." The court says:

"I see no justifiable reason, then, for the inclusion of such misconduct—a violation of oath and of function—as within the protection afforded to proper conduct, namely, due deliberations upon the evidence. I cannot see that the jurors would be deterred from full and free performance of their duties, if such misconduct might be

brought to light by their testimony. I cannot see that the jurors' discharge of their lawful duties is safeguarded by immunity to one of their number who wilfully violates those duties. The honest juror need have no fear of exposure even of his own part, if the principle is confined to its reason. The corrupt juror need have no fear of exposure, if the principle is extended beyond its reason.

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I perceive no reason why the misconduct should be limited to acts, in contradistinction to words. Words are things, and wrongs may be worked by them. Should drunkenness of a juror be liable to exposure, and words whereby, e. g., a juror should offer $1,000 apiece to his fellows for a verdict for his friend, or should threaten that violence would follow any juror who voted against such friend, be protected, because such words are uttered while the jury are deliberating? There is no tangible proof of either misconduct other than the testimony of the jurors.

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I think there should be no question as to the competency of these jurors as witnesses, when the feature of attack upon the verdict is not in the case. * * * * *"

It is claimed by appellant that *In re Cochran* (N. Y.) 143 N. E. 212, 213, repudiates *In re Nunns*. The finding of the court was that the evidence was insufficient to sustain the charge as appears from its language at page 213: "As to the charges of the first character we do not decide that if he falsely answered the questions of the district attorney whether under oath or not under oath he would be guilty of criminal contempt of court. *People ex rel. Nunns* v. *County Court of Nassau County*, 188 App. Div. 424, 176 N. Y. Supp. 858. We fail to find, however, any evidence whatever from which an inference can be drawn that his answers in this respect were untrue at the time they were made." The conduct in the jury room was not being used for its probative force but was itself sought to be punished as contempt, and this distinction is most important. The conclusion of the court was: "What we do hold is that no juror may be punished for contempt for his part in any proceedings connected with the rendition of the verdict, because of discussions had, arguments used, statements made, for the reasons given by him for his vote or for the vote itself."

The above case thus in no way repudiated *In re Nunns, supra,* in which case the juror had not been punished for his conduct in the

jury room, but only for his falsification on the voir dire, and in which case the evidence, which included the conduct in the jury room, was thought sufficient proof of the falsification. And the instant case is thus much more closely analogous to *In re Nunns, supra,* than it is to *In re Cochran, supra.*

The special divinity which surrounds the deliberations of a jury is only so far as the protection of the verdict is concerned. If one juror should bribe the balance of the jury to return a verdict would any court assert that there was no power to show this by the statements of another juror as to what the briber had said. If a juror should present to the jury affidavits of alleged facts which should properly have been a matter of testimony is a court powerless to rectify the wrong which might thus be perpetrated? Must a court sit supinely and spinelessly and permit such misconduct in a juror because of the fine distinction to be drawn that while a court may receive such evidence to show misconduct of a juror in acts, it has no power to do so as to utterances when the acts can only be shown by the utterances. It would carry the doctrine of privilege to absurd results to so hold. We think the whole matter as far as this case is concerned is covered in *McDonald and United States Fidelity & Guaranty Co.* v. *Pless,* 238 U. S. 264, where the court considered the question as to whether the testimony of a juror could be received to prove misconduct of himself or his colleagues in reaching a verdict. The opinion refers to the fact that the rule on the subject has varied and that a juror's testimony in such cases while sometimes received has always been with great caution. The court says there are only three instances in which the subject has been before it. In *United States* v. *Reid,* 12 How. 361, the question was not decided. In *Mattox* v. *United States,* 146 U. S. 140, evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. The Court says in *McDonald* v. *Pless, supra,* at 268, "Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" The court recognizes the general rule that the losing party cannot "in order to secure a new trial, use the testimony of jurors to impeach their verdict," but does recognize there are exceptions to the general rule, and further says: "The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the

principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict." This opinion recognizes that there are exceptions to the general rule stated, and that the same is limited "to those instances in which a private party seeks to use a juror as a witness to impeach the verdict." It is true the question of privilege does not seem to have been raised. The court was dealing with misconduct in relation to impeaching the verdict of a jury, and the closing paragraph in the excerpt is significant and fits the situation in this case. See also *Hyde* v. *United States*, 225 U. S. 347.

There is no question here of impeaching the verdict of a jury. The question is the misconduct of one chosen as a juror. It would seem that if misconduct of a juror in a jury room could be shown by the testimony of other jurors for the purpose of punishing such misconduct that it could be shown for the purpose of its probative force, and that is the situation here. The testimony admitted of other jurors as to the statements and conduct of appellant in the jury room were admissible as bearing on the question of the falsity of answers given by her on the voir dire examination. No public policy requires the proceedings in the jury room to be kept secret under the circumstances here presented.

Assuming, however, that such testimony should have been excluded there is exclusive thereof sufficient evidence in this record in our judgment to sustain the finding of the trial court as to criminal contempt. The facts testified to by members of the jury in brief were, that after the case was submitted appellant announced that as Mr. Horowitz (Government's counsel) could not convince her of the guilt of the defendants the other eleven jurors could not do so; that the Government's witness, Cobel, had given perjured testimony in another case, and that she would like to choke him to death; that she had no use for the Government because it did not use the soldiers right when they came back from the war; that she would not vote to send seven men to the penitentiary; that Foshay had gone East to secure $18,000,000.00, but that because of the crash he could not do so; that she desired to consult with her husband and secure his advice on the case.

The fact that immaterial evidence may have been admitted does not necessarily require the reversal of a case where a court sits without a jury as a trier of fact, as there is a presumption that it acts only upon the basis of proper evidence. If there is not sufficient evidence to sustain the trial court if the improper evidence is dis-

regarded, the presumption of course breaks down. In *Swepston* v. *United States,* 251 F. 205, 209, referring to this question, the Court said: "It is to be presumed that the court at last considered only the facts and circumstances that were in reality admissible and also calculated to support the judgments claimed; and this was in accord with settled rules of practice in cases tried without a jury." In *Sinclair* v. *United States,* 279 U. S. 749, 767, the Court said: "Objections are offered to the admission of certain evidence. In answer, we need only refer to what was said in *The United States* v. *King,* 7 How. 833, 854, 855: 'In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record.' " In *Oates* v. *United States,* 233 F. 201, 205, it is said: "When a judge hears a case without a jury, he is supposed to act only on proper evidence, and if on review it is found that the evidence properly admitted justifies the decree it ought to be affirmed, and if not it ought to be reversed. * * * * * In all these and many other cases the rule laid down by Chief Justice Marshall in *Field* v. *United States,* 9 Pet. 202, 9 L. Ed. 94, has been followed: 'As the cause was * * * * * not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself constitute any ground for a reversal of the judgment.' "

Appellant's brief refers to a statement made on an earlier appeal of *Oates* v. *United States, supra,* 223 F. 1013, referred to in *Gridley* v. *United States,* 44 F. (2d) 716, as follows: "That a judgment of conviction for contempt should be reversed where incompetent evidence is introduced on the hearing, even where the case is heard by the court, was held in *Oates* v. *United States* (C. C. A.), 223 F. 1013, 1014." This was not the holding of the court in the second appeal of the *Oates case, supra.* The court evidently on the first appeal thought that the hearsay evidence improperly admitted was essential to the conviction, and it reversed the case. On the second appeal it thought otherwise and affirmed the conviction.

We think appellant has little to complain of as to the admission of the evidence of other jurors, because the record if such evidence were deleted, is sufficient to sustain the conviction.

Error is claimed in permitting the cross-examination of appellant with respect to what she said and did in the jury room. There is no doubt of the federal rule that in a contempt proceeding a party cannot be compelled on cross-examination to testify against himself, and a defendant who takes the stand in his own behalf can be cross-examined only as to matters elicited in the direct examination. *Balliet* v. *United States,* 129 F. 689; *Wilson* v. *United States,* 4 F. (2d) 289; *Tucker* v. *United States,* 5 F. (2d) 818; *Taylor* v. *United States,* 19 F. (2d) 813; *Madden* v. *United States,* 20 F. (2d) 289; *Fitzpatrick* v. *United States,* 178 U. S. 304. Here appellant was asked on her direct examination as to her having bias or prejudice, which she denied. This opened the door to cross-examination as to matters which might show the absence of an unprejudiced or unbiased state of mind, and her immunity from self-incrimination was not infringed thereby.

It is urged there was a denial of due process of law in proceeding to trial on the return day. The rule to show cause was dated November 4, 1931, and served soon thereafter, the Marshal's return being filed November 6th. Hearing was set for November 9th. She was apprised by the rule that the trial would be had on November 9th. Counsel for appellant on November 9th requested further time and Judge Nordbye stated that the court would hear the evidence the Government desired to present and if any further time were needed for the defense to prepare it would be granted. The Government introduced its case and the matter was then continued from November 9th to November 19th. No further requests were made for continuance, and appellant introduced her evidence. We see no reason for any claim that there was any denial of due process of law in forcing her to trial without an opportunity to prepare. Appellant had complete opportunity to prepare her defense and did not ask for more time after the continuance.

The court imposed on appellant both a fine and imprisonment. The statute provides a punishment by fine *or* imprisonment. Government's counsel claims that there were separate contempts. We think not. The series of alleged false answers were treated as one general contempt of the court. The court did not purport to sentence appellant to imprisonment for one separate act of contempt

and a fine for another. So this court could not know which sentence to relieve appellant of should it disagree with the District Court as to the criminal nature of either act. It sentenced the appellant to a fine and imprisonment "as punishment for the contempt of this court of which she has been found guilty." In our judgment there was but one offense and that was evidently the judgment of the District Court. The case must therefore be remanded for resentencing. *Wilson* v. *United States,* 26 F. (2d) 215. Counsel for appellant in the conclusion of his brief states: "A careful analysis of the record leads unerringly to the conclusion that appellant has been punished, not on account of what she said or left unsaid upon her examination as to her qualifications as a juror, but because she voted to acquit in the criminal case."

It is unthinkable that a court would punish a juror because of a vote for acquittal of a defendant, and it is clear that such was not the case here. It is probable of course that the Government would not have investigated the situation if defendants had been convicted, and the facts produced at the hearing would never have been known. While appellant is entitled to a fair trial, the Government is also entitled to a fair trial, and there can be no fair trial without an impartial jury. While any attempts to coerce jurors should be condemned, courts are not compelled to sit as mere automatons, powerless to preserve the functions intrusted to them. Appellant is not punished because of her vote for acquittal—she is punished because when called as a juror and examined on the voir dire she deliberately and intentionally misled the court and gave answers, some of which were false and others evasive, the result of which was the obstruction of the administration of justice. The judgment of the court as to the contempt is affirmed, but the sentence is set aside and the case is remanded to the trial court only for the purpose of resentencing. *Remanded.*

Filed October 20, 1932.

GARDNER, Circuit Judge, dissenting.

Finding myself unable to agree with my associates, I shall state as briefly as may be the barriers which I am unable to cross. I am not unmindful that a dissenting opinion establishes no legal principle, but it is at least a consolation to the dissenter and a medium of expressing his personal views. In this apologetic frame of mind, and with the deference which is due to the distinguished ability and ingenuity displayed in the majority opinion, I approach

the questions involved in this case. To avoid needless repetition, the facts which I shall state will be supplemental only to those disclosed in the majority opinion.

The appellant, Genevieve A. Clark, summoned as a juror, was called for examination on the voir dire, whereupon the Court administered to her the usual oath as follows: "You do solemnly swear that you will true answers make to such questions as may be put to you touching upon your qualifications and competency to sit as a juror in this case." She had never served as a juror before. She was then interrogated by the Court on the voir dire as follows:

"Q. Genevieve A. Clark, you live at Minneapolis, Minnesota?
A. Yes, sir.
Q. Are you married? A. Yes, sir.
Q. Have you any children? A. I have two.
Q. What is your husband's business?
A. In the real estate business.
Q. In what way is he in the real estate business, is he with some firm, or is he by himself?
A. He is by himself.
Q. Does he deal in city property? A. Yes, sir.
Q. Is he selling property on commission—making a commission? A. Yes, sir.
Q. Does he have an office? A. Yes, sir.
Q. Where? A. 417 South Fourth Street.
Q. How long has he been in the real estate business?
A. For about five years.
Q. Was he in some business before that?
A. Well, we were out of the city for two years, when he was not doing anything. Before that, he was in the real estate and insurance business.
Q. Have you yourself ever been in any business of any kind?
A. I have been a stenographer before my marriage, yes.
Q. In what kind of business did you work?
A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency.
Q. Have you ever read about this case—concerning this case?
A. Yes, sir, I have read some of it.
Q. In what papers? A. The Minneapolis Journal.
Q. Have you read about it lately?
A. I have not read it lately—until just the last day or two.
Q. Did you talk with people, including your husband, concerning it?

A. Yes, sir—pardon me—only with my husband. I have not discussed it with others.

Q. Only with your husband? A. Yes, sir.

Q. Was that some time ago, or just lately?

A. Just lately.

Q. Did you discuss it sometime ago at all with your husband?

A. I don't remember whether I did or not.

Q. Well, did he express an opinion to you concerning it—the guilt or innocence of these defendants?

A. No, he never has.

Q. Well, have you expressed an opinion to him?

A. No, I feel I have no opinion at all.

Q. You have formed no opinion? A. No opinion.

Q. Do you know any of the lawyers in this case?

A. No, I do not.

Q. Or any of the defendants? A. No, I do not.

Q. Have you ever bought or sold any stock in a corporation?

A. No, sir.

Q. Or any bonds? A. No, sir.

Q. What schooling have you had?

A. High school and business college.

Q. You took bookkeeping there?

A. No, I did not take bookkeeping.

Q. You did not take bookkeeping? A. No.

Q. Have you ever had any experience at all in bookkeeping?

A. I have never been an actual bookkeeper, but I have had a little bookkeeping experience when I was doing the insurance work. I was not a bookkeeper at the time, but I had access to the books, and occasionally made entries, but that is all.

Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other? A. Yes, I do feel that way.

Q. Did you ever sit on a jury before? A. No, sir.

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes, I do.

The Court: Any questions?

Mr. Horowitz: No questions.

Mr. Brill: No questions."

The foregoing constitutes the entire examination of this juror and is the basis for this proceeding. She was accepted and served

as a juror, and, as noted in the majority opinion, voted to acquit the defendants and persisted in so doing although all the other jurors voted to convict. The jury being unable to agree was discharged by the court, following which the special prosecutor in charge of the prosecution prepared and filed a complaint which is designated "criminal contempt." In this complaint the special prosecutor charged the appellant with perjury substantially as follows: (1) That she falsely stated the nature of her husband's business at the time of her examination; (2) that she falsely stated the nature of her husband's business some six years and more prior to her examination; (3) that she falsely stated that she did not know any of the defendants in the criminal case; (4) that she falsely stated the nature of her own previous employment; and (5) that she falsely stated that she was unbiased.

On trial the lower court consisting of two judges neither of whom had sat in the trial of the criminal case, found her not guilty of the first three charges, and, among other things, said that:

"In fairness, however, to the defendants in the Foshay case, and their counsel, it should be stated that there is not one scintilla of evidence that would justify a conclusion that any of them had attempted to improperly influence Mrs. Clark."

She was found guilty of having falsely stated the nature of her previous employment, and of having falsely stated that she was unbiased.

Before passing to a consideration of the evidence which it is claimed sustains these two charges, a word may properly be said with reference to the nature of the proceeding.

I agree with the majority opinion that the contempt in this case, if any, is a constructive contempt. I also agree that a contempt proceeding is properly referred to as being in its nature *sui generis*. Within that description, however, proceedings for contempt are of two classes, (1) those prosecuted to preserve the power and vindicate the dignity of the court, and (2) those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce such rights. *Bessette* v. *Conkey Co.*, 194 U. S. 324. The contempt here charged is directed against the power and dignity of the court, and hence, is in its nature criminal or quasi criminal. *Bessette* v. *Conkey Co.*, 194 U. S. 324; *New Orleans* v. *New York Mail S. S. Co.*, 20 Wall. 387; *People* v. *Stone*, 181 Ill. App. 475; *Bridges* v. *State* (Okl.) 132 Pac. 503; *In re Kahn et al.*, 204 Fed. 581;

Merchants Stock etc. Co. v. *Board of Trade of Chicago*, 201 Fed. 20; *In re Rice et al.*, 181 Fed. 217; *Clay* v. *Waters*, 178 Fed. 385; *In re Nevitt*, 117 Fed. 448. The proceedings for the punishment of such a contempt should conform as nearly as possible to proceedings in criminal cases. *Cooke* v. *United States*, 267 U. S. 517; *Bessette* v. *Conkey Co.*, 194 U. S. 324; *Anargyros* v. *Anargyros & Co.*, 191 Fed. 208; *Nichols* v. *State* (Okl.) 129 Pac. 673; *People* v. *Stone*, 181 Ill. App. 475; *Bates' Case*, 55 New Hamp. 325; *Ex parte Nelson* (Mo.) 157 S. W. 794.

The Government has recognized the proceedings as being criminal in character, and the special prosecutor in initiating them designated the complaint as "criminal contempt." As in a criminal prosecution, to warrant conviction, a mere preponderance of the evidence is not sufficient, but it must be such as to convince beyond a reasonable doubt of the guilt of the accused. *Gompers* v. *Buck's Stove etc. Co.*, 221 U. S. 418; *Hanley* v. *Pacific Live Stock Co.*, 234 Fed. 522.

I have referred to the nature of the proceeding because I am impressed with the thought that its character was not appreciated by the trial judges who heard the evidence in this proceeding.

While the defendant was on the witness stand under cross-examination by the special prosecutor the following proceedings occurred:

"Q. Yes, she was drawn first. Do you remember talking to her?

Mr. Ueland: This is objected to as not proper cross-examination. I would like to be heard on that objection.

Judge Nordbye: Oh, I don't think we will just go by the rules of evidence, Mr. Ueland, which we recognize in ordinary matters. Objection overruled.

Mr. Ueland: Exception."

The trial was conducted under this misapprehension that the defendant was not entitled to invoke the protection of the ordinary rules of evidence, and though the proceeding, as has been noted, was in the nature of a criminal one, the rules of evidence in so far as they were invoked on behalf of the defendant were avowedly brushed aside.

I shall later have occasion again to refer to some of the rulings of the court on the admissibility of evidence. My purpose in

making this statement at this point is simply to indicate the conception which the lower court had as to the nature of the proceeding.

But not only did the lower court avowedly disregard the ordinary rules of evidence, but the rules of criminal pleading were so strained as to deprive the appellant of the rights guaranteed her under the Constitution. A glance at the complaint convinces that it was the intention of the pleader to charge the appellant with a contempt of court by the commission of perjury on the voir dire. This complaint sets out with particularity the administering of the oath by competent authority, the substance of the questions asked, the answers to those questions, and then charges that these answers were false and knowingly false. It sets out what the true answers would have been, and it distinctly alleges wilful perjury. Not only does it distinctly allege wilful perjury, but it makes no mention whatever of *concealment*, and the complaint closes by alleging that the due administration of justice was thereby corruptly and unlawfully impeded and obstructed. Confessedly, justice might be impeded and obstructed in innumerable ways, and under proper charge might be punished as a contempt, but the particular contemptuous act charged in the complaint in this proceeding was perjury. In the opening paragraph of the lower court's findings, it is recited that the charge was "contempt of court for having committed *perjury* upon her examination as to her qualifications as a juror."

The evidence being confessedly insufficient to sustain the charge of perjury, the lower court took the position that *concealment* could be considered, although it was not mentioned in the complaint, and that it was not necessary that perjury be established. The court, after quoting from *Ex parte Hudgings*, 249 U. S. 378, said:

"From this statement, it would appear that untrue answers to questions asked on the voir dire might be of such a character as to obstruct justice and constitute a contempt of court, although the person giving the answers might not be guilty of perjury in the strictest sense."

This, it seems to me, is quite aside from the question. Doubtless the statement is correct, but the authority cited does not sustain the proposition that a party may be charged with being in contempt of court by wilful perjury and on trial of such charge be convicted by proof of some other kind of contempt of court.

The statement in the decision of the lower court to the effect that the information "specifically informed Mrs. Clark that she

was guilty of contempt on account of her failure to disclose the fact of her employment with the Foshay Company," is not sustained by the record. She was charged with contempt *not for having concealed, but for having committed perjury.* She was acquitted of perjury, but convicted because she had concealed certain facts, a matter with which she was not charged. So I agree with appellant's counsel that appellant has been convicted of something with which she was not charged in the complaint.

The majority opinion, and the opinion of the lower court, concedes that perjury was not established by the testimony. In a case of criminal constructive contempt, the alleged contemner is entitled to all the safeguards imposed by "due process of law." She was entitled to all the protection afforded in cases of indictment, except the right of trial by jury. Certainly, she was entitled to know the nature of the offense. *Cooke* v. *United States,* 267 U. S. 517; *Anargyros* v. *Anargyros & Co.,* 191 Fed. 208; *Boyd* v. *Glucklich,* 116 Fed. 131; *Ex parte Clark* (Mo.) 106 S. W. 990; *Ex parte Nelson* (Mo.) 157 S. W. 794.

In *Cooke* v. *United States, supra,* the rule applicable to criminal contempt is thus stated:

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

And in *Anargyros* v. *Anargyros & Co., supra,* the Court said:

"While the nicety and precision of an indictment may not be required, the pleading or affidavit must not only specify clearly the acts which the contemnor will be called upon to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character."

The Supreme Court of New Hampshire in the *Bates case, supra,* in an opinion by Chief Justice Foster, said:

"It seems to me to be more appropriate, and it would seem safe enough for the protection of the court, to adhere as closely as possible to the plan and method of criminal procedure, except in the matter of jury trial. The attachment should be substantially like

an indictment, at least, to the extent of giving the respondent sufficient information concerning the nature and particulars of the offense charged; and the rules of evidence, and the presumptions of law applied in criminal cases, should be observed."

This court in *Boyd* v. *Glucklich, supra,* said:

"in proceedings involving the liberty of a citizen, he has a right * * * to be informed of the precise claim against him."

In this case there was no ambiguity in the complaint. It specifically charged a contempt of court by the commission of perjury. There was no occasion for defendant to demand a bill of particulars. Whether or not she had "deliberately and intentionally concealed her employment with the Foshay Company when she was examined by the court" was not charged and was not in issue.

The case was presented in the lower court, both on behalf of the Government and on behalf of the defendant, on the theory that if her answers did not constitute perjury as charged, she was entitled to an acquittal. The offense of which she was found guilty was one constructed by the trial court from the evidence and was not charged in the information or complaint. It is stated in the majority opinion that,

"The Government here elected to proceed for contempt and not for perjury—doubtless having in mind the difficulty of conviction of perjury."

I am unable to find anything in the record to support this statement. The Government proceeded against the defendant for perjury, and if any election was made it was by the lower court after the evidence had all been presented and arguments made, and not by the Government.

There was a total failure of proof of the charge made against appellant, and finding her guilty of an offense not charged was violative of the fundamental principles of fair play, and resulted in depriving appellant of her liberty and property without due process of law. In sustaining this holding of the lower court, my associates, in my opinion, have fallen into the same error. There was a material and fatal variance between the charge and the proof.

In reviewing the evidence I shall first refer to the charge that the appellant falsely stated the nature of her previous employment.

So far as experience in court was concerned, appellant was a novice. Jury service for a woman in a case so notable as the

Foshay criminal case was in the nature of a great adventure, finding no parallel in the background, traditions or history of her sex, the duty of jury service having but recently been imposed upon women. She was sworn, not as an ordinary witness "to tell the truth, the whole truth, and nothing but the truth," but the oath which she took was a restricted one and obligated her only to make true answers to such questions as might be put to her, touching her qualifications and competency to serve as a juror.

I have set out every question and every answer of her examination. No one ever inquired of her whether she had ever been employed by the defendants, or either of them, nor by the Foshay Company. It is said that she must have had in mind that her temporary employment which had occurred some two years prior to her examination, would disqualify her to sit as a juror. As a matter of fact, such employment would not, of course, have disqualified her. But even conceding the possibility that she may have had the matter in mind, yet not having been interrogated with reference to it, this may well have disabused her mind of the thought that such employment was a disqualification or even material. She was sworn to answer questions. The questions were propounded by the court, and counsel for either side, including the special prosecutor, were given an opportunity to propound or suggest further interrogatories. Under our practice, even when an ordinary witness is sworn to tell the truth, the whole truth, and nothing but the truth, we still preserve what is thought by trial lawyers to be the almost sacred right of cross-examination. Why is such a procedure preserved? Every lawyer who ever had any experience at all in the trial of lawsuits, knows that it is necessary for the purpose of developing and ascertaining the truth, to cross-examine, and that a witness, though required to tell the whole truth, is not likely even if willing so to do, to be competent to determine all of the facts in his knowledge which may be material or competent; and if a witness makes a voluntary statement not responsive to a question, it is on motion promptly stricken from the record. This appellant, however, though by her oath only required to answer the questions propounded to her, has been convicted of criminal contempt because she did not voluntarily disclose further facts concerning which she was not interrogated. This is applying to the juror, obligated only by a restricted oath, a more strict rule and imposes a higher standard of intelligence, and visits upon her a Draconian severity not applied to any other human being connected with the trial of a lawsuit.

Supposing an ordinary witness were called and examined only by the presiding judge who knows presumably nothing as to what facts the witness may know, and who of necessity is not conversant with either the facts or issues involved in the case. Then let us suppose neither party chooses to examine the witness, or is prevented by the presiding judge from so doing. It later develops that the witness in fact knew other facts which were material but concerning which he was not interrogated. Would anyone contend, or could any court hold the witness guilty of contempt of court? Such a determination by a court would be denounced as arbitrary, tyrannical, and cruel, and yet this appellant has been convicted because she has not made further disclosures about matters concerning which she was not interrogated, though she was obligated by her oath only to answer truly such questions as might be put to her.

The majority opinion fixes a standard of perfection which makes no allowance for the fallibility and frailties of the human intellect. The juror is held bound to know and to disclose all matters which may have any possible bearing upon his fitness or competency to sit as a juror, and this he must do without assistance of either court or counsel under the penalty of being punished for contempt for his failure to disclose some matter which a special prosecutor, failing to secure conviction, may think material to the qualification of the juror. The matter of this employment was, to my mind, of doubtful materiality in view of the finding that the juror knew none of the defendants, the temporary character of the employment, and its remoteness in time. In all the fields of human endeavor, the law neither assumes nor demands the perfect nor the ideal. The perfect and the ideal are abstractions. They are the imaginary standards toward which we strive, but which, confessedly, we never attain. The law, recognizing our limitations, only demands that we approximate the perfect or the ideal, and requires reasonable care, reasonable skill, and reasonable restraints; in fact, in the entire realm of jurisprudence we are governed by the rule of reason. Even in the administration of justice the ideal is not required.

Let us suppose that this juror, instead of standing out against the other jurors, had in fact been an ardent advocate in the jury room for conviction, while certain of the other jurors were for acquittal but finally joined in a verdict of guilty, and defendants' counsel had made application for a new trial on the ground that this juror had not disclosed the fact that she had at one time been employed by the Foshay Company, and that she had wilfully con-

cealed this relation from the court. What would then have been the attitude of counsel for the Government? Would he not have urged, first, that the matter of employment was entirely immaterial, second, that the juror had not been asked with reference thereto, though counsel might have interrogated her, and, third, that in view of the finding of no corruption, this attack on the juror's conduct in failing to disclose a remote and casual employment by the Foshay Company, was so entirely wanting in substance as to be frivolous. Certainly, no court would have considered seriously such an application, and yet we are assured that the fact that she voted to acquit, is a matter of no materiality or concern whatever. I concede that it ought not to be, yet in the final analysis I cannot escape the thought that she is being punished for contempt of court because she stood out for acquittal against eleven men convinced of the guilt of the defendants.

It is urged that the testimony of two women summoned as jurors showed that the appellant had in mind that her employment with the Foshay Company might disqualify her as a juror, and further that she was anxious to serve as a juror. The trouble with this testimony is that it proves too much. According to this testimony she said to one woman that she was certain that such employment would not disqualify her, while she is reputed to have said to the other woman that she wondered if it would disqualify her. She denies having had these conversations. One of these women, a Mrs. Passer, testified that Mrs. Clark had said to her that she was simply praying to serve as a juror in that particular case, and that she had a very special reason but did not state it. This witness, after her alleged talk with Mrs. Clark with reference to this case, was herself examined on voir dire as follows:

"Q. Have you ever talked with anyone about the case?
A. I have never mentioned it to a soul."

Yet, according to her testimony in this proceeding, she had talked about the case with the appellant and with a Mrs. Johnson. This testimony would seem entirely to negative the theory upon which this conviction is sought to be sustained.

It is urged that she cleverly and cunningly concealed from the court and counsel the fact which is now magnified into great importance, that she at one time was employed for ten days by the Foshay Company. If she were practicing such cleverness and deceit, she would not have proclaimed to her associates in the court room that she feared her employment might disqualify her, and

that she was anxious to serve on the jury. These circumstances are inconsistent with any such purpose as is now charged against her. As to her alleged desire to serve on the jury, that is a circumstance entirely consistent with her innocence. She may have had a woman's ambition to attain the notoriety of serving on this notable case, and, as before noted, when she was not interrogated with reference to her employment, she may well have concluded that it was such a trivial and immaterial matter that she was not even asked with reference to it. The evidence adduced against her on this charge is purely circumstantial; but the charge, being perjury, could not be established by circumstantial evidence, but must be proved by the sworn testimony of two living witnesses, or one witness and by corroborating circumstances. *Hammer* v. *United States*, 271 U. S. 620; *United States* v. *Wood*, 14 Peters 430; *Clayton* v. *United States*, 284 Fed. 537; *Allen* v. *United States*, 194 Fed. 664. To establish guilt of any other criminal offense by circumstantial evidence, the circumstances must not only be consistent with and tend to prove her guilt, but must be inconsistent with any theory of innocence. *Spalitto* v. *United States*, 39 Fed. (2d) 782; *Beck* v. *United States*, 33 Fed. (2d) 107; *Bishop* v. *United States*, 16 Fed. (2d) 410; *Colbaugh* v. *United States*, 15 Fed. (2d) 929; *Salinger* v. *United States*, 23 Fed. (2d) 48; *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737; *Van Gorder* v. *United States*, 21 Fed. (2d) 939. In view of this rule of law, I am of the view that there is no substantial evidence upon which the conviction in this case can stand.

The examination of this juror on voir dire was confessedly meager, and the result is, in my opinion, due largely to the procedure adopted in the examination of jurors. Counsel for either side should be given ample opportunity, especially in an important criminal case, to make, under the supervision of the court, a searching examination of each juror. Without the privilege of an examination of jurors by counsel on either side other means of ascertaining facts with reference to jurors are resorted to. They are privately investigated by counsel on either side through various channels, which practice may well be looked upon with suspicion because it may result in direct or indirect contact with jurors, whereas, if it be understood that counsel may have the opportunity of thoroughly examining each juror in open court under the supervision of the presiding judge, such situations as are presented in this case would not occur; nor would there be occasion for the practices to which reputable counsel find it necessary to resort in ascertaining, out of court, facts which they deem necessary to

know with reference to the jury panel. *Gideon* v. *United States*, 52 Fed. (2d) 427.

The other charge on which appellant was found guilty is that she falsely stated that she was unbiased. Here again she was specifically and with great particularity and formality charged with perjury. The only direct testimony as to the condition of her mind was her own. She testified that she had no bias or prejudice at the time she was examined as a juror. The charge being perjury, it could only be established by the testimony of two living witnesses, or one witness and by corroborating circumstances, and it could not be established by circumstantial evidence alone. *Wigmore on Evidence*, Secs. 2040-2043; *United States* v. *Wood*, 14 Peters, 430; *Hammer* v. *United States*, 271 U. S. 620; *Clayton* v. *United States*, 284 Fed. 537; *Allen* v. *United States*, 194 Fed. 664; *Sullivan* v. *United States*, 161 Fed. 253. The lower court, however, though confessing some difficulty "to ascertain with mathematical certainty the state of her mind when examined as a juror," found that the evidence established beyond reasonable doubt that her mind was not at the time free from prejudice and bias. What was the state of her mind *at the time she was examined?* With great deference I pause at the threshold of this inquiry. While we may say with the ancient Greek Philosopher that "The mind is the measure of all things, of things that are, that they are, of things that are not, that they are not," or exclaim with Victor Hugo, "Add, if you can, anything to the human mind!", yet the field of psychological phenomena is a limitless undiscovered realm, which only prophets and oracles of the intellect may venture to explore.

It is here not only necessary to prove beyond reasonable doubt that *at the time appellant was examined* on voir dire she was biased and prejudiced, but it is also necessary to prove beyond a reasonable doubt that she at the time knew that she was biased and prejudiced. Rarely does the individual ever recognize or admit that he is biased or prejudiced or lacking in open-mindedness. The individual generally believes that he is unbiased and unprejudiced, and it is well understood among members of the bar that even the single juror who hangs a jury is thoroughly convinced that the other eleven members of the jury were biased and prejudiced and lacking in open-mindedness. No one realizes better than the trial lawyer that jurors rarely disqualify themselves upon the ground of bias or prejudice, and in the rare instances when this occurs it is usually because the juror adopts this means

of avoiding service on the jury. There is no fixed standard by which it can be determined whether one is biased and prejudiced, and certainly no standard by which the individual may himself determine this condition of mind. In fact, judges are often thought to be biased and prejudiced, but rarely are they conscious of any bias or prejudice, and if interrogated under oath would disclaim any such condition of mind. Only the rarest individual who subjects himself to self-examination is so discerning as to recognize his own prejudices.

The utterances of the accused in the jury room some six or seven weeks subsequent to the time she testified on voir dire are relied upon as establishing perjury in her statement relevant to her condition of mind. These utterances were so remote from the time she testified, and so many things had transpired during this trial which might have changed a perfectly unbiased mind into a biased and prejudiced one, that they lose all probative force and should not have been admitted. At most these utterances in the jury room might be said to show that her mind was then biased, and her mind being biased at that time proves, or tends to prove, that it was biased at the time of the voir dire Such reasoning is violative of the principle that one presumption cannot form the basis of another presumption. *Brady* v. *United States*, 24 Fed. (2d) 399; *General Reins. Corp.* v. *Southern Surety Co.*, 27 Fed. (2d) 265; *Lincoln Natl. Life Ins. Co.* v. *Erickson*, 42 Fed. (2d) 997.

It must be borne in mind that the judges who sat in the instant proceeding did not sit in the criminal trial and had no personal knowledge of what transpired between the time the juror qualified and the time of her alleged utterances. These utterances are just as consistent with an honest belief based upon the evidence in the case, so far as this record shows, or on incidents that may have occurred during the trial, as they are with the conclusion that she had a biased and prejudiced mind. Certainly, the facts and circumstances proven are not inconsistent with the following theories of appellant's innocence: (1) That she at the time of her examination was in fact unbiased, or, if biased, she was not conscious of it at the time of her examination; (2) that any subsequent statements made by her alleged to indicate bias, were the result of testimony, proceedings and transactions occurring during the trial, or were the result of her sympathies influenced thereby; and (3) that she voted for an acquittal because she was not convinced that the evidence proved the guilt of the defendants be-

yond a reasonable doubt, and that in so doing she was responding to her oath as a juror and her own conscience, rather than to some overpowering prejudice or mysterious dominating will.

There being no proof of corruption and no proof of any motive or reason calculated to induce wrongful conduct on her part, the circumstances relied upon fall far short of excluding every other hypothesis except that of guilt, and to my mind do not constitute substantial evidence proving the appellant's guilt beyond a reasonable doubt.

But quite aside from the probative value of the evidence of appellant's utterances during the deliberations of the jury, I am of the view that this testimony was not admissible. It is fundamentally essential to the proper administration of justice that jurors should understand that their deliberations in the jury room are inviolable and that the reason for their verdict cannot be questioned. There are two grounds for this rule. The first may be said to adhere in the integrity of the jury as an institution, and the second is based upon the privilege of the individual juror. In *Stephen's History of the Criminal Law of England,* Volume I, at page 306, the author in discussing the development of trial by jury, says:

"The right of the jury to return a verdict according to their own consciences, and without being subjected in respect of it to any penal consequences was finally established by Bushell's case in the year 1670. In some earlier instances and particularly in the celebrated case of Sir Nicholas Throckmorton in 1554, the jurors were imprisoned and heavily fined for acquitting a prisoner. This, however, was regarded as a great stretch of power even in those days. Sir Thomas Smith says—'If they' (the jury) 'do pronounce not guilty upon the prisoner against whom manifest witness is brought in the prisoner escapeth; but the twelve not only rebuked by the judges but also threatened of punishment, and many times commanded to appear in the Star Chamber or before the Privy Council for the matter. But this threatening chanceth oftener than the execution thereof, and the twelve answer with most gentle words they did it according to their consciences and pray the judges to be good unto them as they did as they thought right and as they accorded all, and so it passeth away for the most part.' He then refers to cases in which the jurors had been fined —no doubt having in his mind Throckmorton's case, and adds, 'But these doings were even then of many accounted very violent,

tyrannical, and contrary to the liberty and custom of the realm of England.'

"Anciently, it may be, though the contrary seems as probable, jurors who returned a corrupt verdict in criminal cases were liable to what was called an attaint at the suit of the king, though not at the suit of the party. The attaint was a remedy for a corrupt verdict in civil cases, and was tried by a jury of twenty-four, who, if they thought proper, might convict the first jury of a false verdict."

Dean Roscoe Pound in his book *"Criminal Justice in America,"* at page 115, says:

"Throughout the seventeenth century the power of juries to render general verdicts was a chief obstacle to the attempts of the crown to use criminal justice for political purposes. When Bushell's case established that jurors could not be punished for contempt in using this power as their own reasons and consciences dictated, the trial jury seemed to stand first among the common-law bulwarks of individual freedom."

See also: *Woodward* v. *Leavitt*, 107 Mass 453; *In re Cochran* (N. Y.) 143 N. E. 212; *Jones on Evidence*, (2nd Edition) Sec. 2212; *Wigmore on Evidence*, Secs. 2346-2354; *Hyde* v. *United States*, 225 U. S. 347.

But it is said in the majority opinion that this proceeding is not for the purpose of punishing the juror for anything that she may have said or done during the deliberations of the jury, but for having falsely stated her state of mind at the time of her examination on the voir dire. In a qualified way this is correct, but having in mind the purpose and reason for the rule and the history and traditions upon which the rule is based, the distinction, it seems to me, is one going to form rather than to substance or principle. If the freedom and independence of the jury and the secrecy of their proceedings are to be maintained inviolate, then that principle is violated by permitting other jurors to disclose the proceedings of the jury on the prosecution of a juror for contempt for having falsely testified on his examination on voir dire. The result is the same. If, when a juror is unfortunate enough to be in the minority, and we may assume that at least until the final vote no juror will know whether that is to be his status or not, he must act under restraint because he may later be prosecuted for having falsely stated his state of mind, then the freedom of expression in the jury room and the independence of the jurors will have been

destroyed quite as effectively as if during their deliberations they are under the restraint of a possible prosecution for misconduct in their discussions and deliberations. The reason for the rule excluding such testimony is quite as cogent as where it is sought to punish the juror for utterances and arguments in the jury room. Jurors must, if the system is to be maintained, be exempt from the liability of being questioned as to their motives and grounds of action while acting as jurors. The language of the Supreme Court in *Sinclair* v. *United States*, 279 U. S. 749, is significant. It is there said:

"If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust."

Mr. Hughes in his *Work on Evidence*, at page 302, says:

"On the ground of public policy, freedom of expression in the jury room is absolutely essential. It follows, therefore, that the rule of privilege is applicable in the full sense of the term to the deliberations of petit jurors."

Mr. Jones in his *Commentaries on Evidence*, Sec. 2212, says:

"It is essential to the due administration of justice that jurors should understand that their deliberations in the jury room are inviolable, and that the reasons for their verdict cannot be questioned."

The Court of Appeals of New York in *In re Cochran, supra*, in an opinion by Mr. Justice Andrews, says:

"It is not alone as to the final result—the verdict—that they (jury) are protected. Public policy requires that they be given the utmost freedom of debate as it requires it in the case of the Legislature."

Underhill on Criminal Evidence, 3rd Edition, at Section 311, states the rule as follows:

"As regards traverse jurors the rule seems now to be that they may testify only to facts or communications referring to their actions as individuals while separated from their associates. They may testify to what third persons said or did to them as individual jurors. But the motives and reasons of the jury and the transactions and communications referring to the subject-matter under their consideration as an official body, and which were made in their capacity as jurors, are privileged, whether made in the jury

room or elsewhere. Evidence from the jurors to show their ignorance, or misconduct, or to impeach their verdict for the purpose of obtaining a new trial, cannot be received. The admission of such evidence is contrary to public policy and injurious to the administration of justice."

Mr. Wigmore in his *Work on Evidence*, at Section 2346, among other things says:

"Under the parol evidence rule, the juror's testimony is excluded only when it is offered to prove facts nullifying the verdict, on a motion for a new trial. But under the privileged communications rule, the juror's testimony would be excluded for any purpose whatever,—for example, where upon another trial he was a witness and his bias was offered to be shown by his expressions during retirement with the former jury. Thus the genuine privilege may have a larger scope than the parol evidence rule."

Neither is there anything in the dictum in *McDonald* v. *Pless*, 238 U. S. 264, referred to in the majority opinion, inconsistent with the rule stated by the above authorities. The question in that case was whether misconduct in the jury room might be shown in cases where no attempt was made to impeach the verdict, and the question of privilege was not considered by the Supreme Court. In the instant proceeding the question is whether what was said by the juror in the jury room could be used against her to prove an alleged wrongful act committed at some other time and place.

The proceeding sanctioned by the majority opinion in the instant case will go far to undermine the independence and freedom of the jury.

This testimony was also inadmissible because it was privileged. The majority opinion, by way of illustration, gives instances of acts of jurors which should be subject to punishment. Confessedly, not all the acts of a juror are privileged. Those acts which do not adhere in the verdict, but which are ministerial, are not privileged. This is pointed out in *In re Cochran, supra*, where it is said:

"In Bushell's case the distinction was clearly drawn between two kinds of misconduct, a breach of their ministerial duty and of their judicial. Probably a juror who concealed a reporter in the jury room might be held guilty of contempt as would be the reporter himself; or a juror who smuggled in intoxicating liquor and consumed it, or induced his fellows to do so. * * *

"In the case before us each one of the alleged second class of offenses relates to arguments claimed to have been made in bad faith; statements of fact said to be false, and votes as to the verdict said to be knowingly perverse. Admitting all that is claimed, there is no basis for a finding that Cochran was guilty of criminal contempt. If in any of these respects he was guilty of corrupt conduct, the only remedy is by indictment and by trial before a jury."

Finally it is said in the majority opinion that the fact that immaterial evidence may have been admitted does not necessarily require a reversal of the case where the court sits without a jury, because there is a presumption that it acts only on the basis of proper evidence. There are two answers to this suggestion. First, if this evidence be excluded, there is no substantial evidence to sustain the judgment of the trial court, and the evidence is not only immaterial but is incompetent; and second, that while it will ordinarily be presumed that the court sitting without a jury considers only the material and competent evidence, yet this is only a presumption, and it affirmatively appears in this case that the court did consider and did rely upon this very evidence. In the opinion of the trial court it is said:

"During the deliberations of the jury, after the case was finally submitted, she announced that, since Mr. Horowitz had been unable to convince her of the guilt of the defendants, the other jurors could hardly expect to do so. She virtually closed her ears to the arguments of other jurors, and made a statement with respect to the Government witness Cobel, the effect of which was to charge him with having given perjured testimony in a case in the South in an attempt to convict an innocent man. * * * Mrs. Clark, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. She also made statements to the effect that she could not vote to send seven men to the penitentiary. The jury were out for approximately one week, and stood eleven for conviction, and one (Mrs. Clark) for acquittal."

In another part of the opinion the court refers to the appellant's "unyielding attitude" in the jury room.

This conclusively shows that the trial court did not disregard nor exclude this incompetent evidence, and it is elementary that when facts appear presumptions vanish. A presumption cannot be weighed in the balance as against facts. *United States* v. *LeDuc*, 48 Fed. (2d) 789; *Guaranty Trust Co.* v. *Minneapolis &*

St. L. R. Co., 36 Fed. (2d) 747; *Fidelity & Casualty Co.* v. *Niemann*, 47 Fed. (2d) 1056.

It is a well-established and oft-repeated rule that the power to punish for contempt of court should be used sparingly and with great caution and deliberation. *Gompers* v. *Buck's Stove etc. Co.*, 221 U. S. 418; *Cooke* v. *United States*, 267 U. S. 517; *Boyd* v. *Glucklich*, 116 Fed. 131.

In *Gompers* v. *Buck's Stove etc. Co.*, *supra*, the Supreme Court said:

"But the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper."

In *Cooke* v. *United States*, *supra*, the court said:

"But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions."

The power to punish for contempt should be used sparingly and with great caution, and after all, the authority, majesty and dignity of the court and the respect which it may command depend more on the righteousness of its judgments than on the exercise of its power to punish for contempt.

Other questions involved invite discussion, but this opinion has already been unduly extended.

There is so much uncertainty and doubt as to the guilt of the appellant, and so much doubt as to the regularity of the proceedings leading up to her conviction, that I am impelled to the view that the judgment of the lower court should be reversed and the cause remanded for further proceedings.

Filed October 20, 1932.

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170 (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

October Term, 1932.

Tuesday, October 25, 1932.

Genevieve A. Clark, Appellant,
No. 9457. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court as to the contempt, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court, and the sentence imposed on defendant, appellant here, by said District Court is hereby set aside.

It is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court only for the purpose of resentencing, not inconsistent with the opinion of this Court.

October 25, 1932.

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171 (Motion for Stay of Mandate.)

Now comes the appellant and moves the Court for an order directing a stay of the mandate of the Court to the United States District Court for the District of Minnesota for a period of sixty days after the date of the judgment of the above named Court pending application by appellant to the Supreme Court of the United States for a writ of certiorari. This motion is made under Rule 32 of the above named Court and is made on the ground that appellant will apply to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court entered herein on October 25, 1932; that appellant has ordered the proceedings in this Court printed to that end, and has deposited with the Clerk of this Court the estimated cost of such printing, and appellant believes that it will be impossible to complete such printing, to prepare appellant's petition for writ of certiorari and supporting brief and have the same printed, served and filed with the Clerk of the Supreme Court within thirty days after the entry of the judgment of this Court.

SIGURD UELAND,
Attorney for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 5, 1932.

(Order Staying Issuance of Mandate.)

October Term, 1932.

Wednesday, November 9, 1932.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme

Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the
172 mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 9, 1932.

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173 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress approved February 13, 1911, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause wherein Genevieve A. Clark was Appellant and the United States of America was Appellee, No. 9457, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of November, A. D. 1932.

E. E. KOCH,
(Seal) Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted and the case is advanced and assigned for argument on Monday, February 6th next, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
NOV 28 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 531.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1932.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Genevieve A. Clark, respectfully submits her petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause.

The Circuit Court of Appeals has affirmed a judgment rendered in the United States District Court for the District of Minnesota adjudging petitioner guilty of contempt of court and sentencing petitioner to six months in jail and to pay a fine of $1,000.00, but the Circuit Court of Appeals has ordered said cause remanded to the District Court for the District of Minnesota for resentencing, with directions to impose fine or imprisonment in the alternative.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner served as a juror in the case of *United States vs. W. B. Foshay, et al.*, a celebrated mail fraud case tried in the United States District Court of Minnesota. The trial lasted about seven weeks and the jury was out about one week. The jurors were unable to agree and were finally discharged on October 23, 1931.

Shortly thereafter an information charging petitioner with criminal contempt was filed. A rule was issued directing petitioner to show cause "why she should not be adjudged in contempt of the authority of this Court as prayed in said petition" or information (R. 1-6). On the return day petitioner filed her sworn answer positively denying all of the charges (R. 6-10). Counsel for petitioner asked for additional time to prepare for trial, but this was denied and the Court proceeded to hear witnesses on behalf of the government (R. 10-12). At the close of the government's case, however, the Court did grant a continuance for ten days to enable counsel for petitioner to prepare her defense (R. 58, 59).

The information charged petitioner with contempt of court for committing perjury on her *voir dire*. Omitting the charges of perjury of which she was found not guilty, the charges were (1) that she falsely stated the nature of her own previous employment, and (2) that she falsely stated that she believed herself to be unbiased (R. 1-6). No claim is made that petitioner did not answer the questions put to her respectfully. Both the District Court and the Circuit Court of Appeals appear to concede that perjury was not proved in connection with petitioner's an-

swers as to her previous employment, but both courts have found her guilty of contempt for failing to disclose that over two years prior to her examination she was employed for ten days as a stenographer by W. B. Foshay Company, a corporation of which the defendants in the criminal case were officers. Both courts have found petitioner guilty of contempt of court for stating that she believed herself to be unbiased. The record seems barren of evidence tending to prove conscious bias on the part of petitioner at the time of the *voir dire*. Over objection, testimony was received as to what she subsequently said and did during the course of the trial and during the deliberations of the jury, and the fact that she voted for an acquittal, all of which evidence was relied upon by the trial court in finding that petitioner was biased, and knew she was biased, one to eight weeks earlier, when she was examined on this subject.

There was absolutely no evidence of corruption on the part of petitioner and absolutely no evidence affording any motive to petitioner to answer falsely or deceive the Court. This is conceded in the majority opinion in the Circuit Court of Appeals (R. 136). Likewise the evidence established that petitioner did not know any of the defendants in the criminal case (R. 104, 105).

Petitioner was sentenced to serve six months in jail and to pay a fine of $1,000.00.

The Circuit Court of Appeals affirmed the judgment of the District Court but set the sentence aside and remanded the case for the purpose of resentencing (R. 125-145, 164, 165). The sentence was set aside because under the statute contempt of court may be punished by fine or imprisonment but not by both. 28 U. S. C. 385.

Gardner, Circuit Court Judge, dissented in an able opinion (R. 145-164).

A more detailed statement of the matters involved is set forth in the annexed brief:

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The Circuit Court of Appeals erred in holding in effect:

1. That it was "due process of law" for the District Court to require petitioner to proceed to trial on the return day named in the order to show cause, when she was allowed only three business days to select counsel, prepare her answer, and prepare for trial.

2. That it was "due process of law," when the only charge against petitioner was that she was guilty of contempt of court for committing "wilful and corrupt perjury" on her *voir dire*, to find her guilty of a never-before-heard-of contempt, to-wit: failure to volunteer information.

3. That a failure to volunteer information by a prospective juror on his *voir dire* is a contempt.

4. That if a juror commits perjury on his *voir dire*, that *ipso facto* constitutes a contempt even though no contumacy is shown.

5. That a juror's sworn statement that he believes himself to be unbiased is proved to be "false and corrupt perjury," beyond a reasonable doubt, by (1) proof of subsequent statements made by the juror in the course of the trial and during the deliberations of the jury tending to show bias at the time such statements

were made (but not indicating consciousness of bias), and (2) by proof of the juror's vote to acquit.

6. That the principle which applies on an indictment for perjury that a conviction may be had only on direct testimony of two witnesses (or of one witness supported by corroborating circumstances) as to the falsity of the testimony given, does not apply in a criminal contempt proceeding charging "false and corrupt perjury."

7. That statements of a juror during the deliberations of the jury and the juror's vote to acquit may be shown in a criminal contempt proceeding based upon what transpired on the *voir dire* and that such matters are not privileged.

8. That even if incompetent evidence is erroneously received by the trial court and it appears by the decision of the trial court that such evidence was relied upon by it in arriving at its decision, that is not necessarily reversible error.

B. In the majority opinion of the Circuit Court of Appeals it is stated "that many important questions are raised by the assignments of error" (R. 125). In the dissenting opinion in the Circuit Court of Appeals it is stated "the proceedings sanctioned by the majority opinion in the instant case will go far to undermine the independence and freedom of the jury" (R. 162).

C. Your petitioner is advised and believes that the Circuit Court of Appeals in affirming the judgment of the District Court has deprived petitioner of important rights vouched to her by the Constitution of the United States; has decided important questions of general law in conflict

with the decisions of this Court and with the weight of authority, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, all of which will more fully appear in the annexed brief.

SIGURD UELAND,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
DISTRICT OF MINNESOTA, ss.
COUNTY OF HENNEPIN.

SIGURD UELAND, being duly sworn, says he is counsel for the petitioner named in the foregoing petition; that he knows the contents of such petition, and that the facts therein stated are true to the best of his knowledge and belief.

SIGURD UELAND.

Subscribed and sworn to before me this 17th day of November, 1932.

MAUD GOLDSBURY,
(Notarial Seal) Notary Public,
Hennepin County, Minn.

My commission expires Dec. 16, 1936.

Supreme Court of the United States

OCTOBER TERM, 1932.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF.

STATEMENT.

Petitioner has been convicted of contempt of court by the United States District Court of Minnesota upon a charge that she committed perjury in her examination as a prospective juror in a criminal case. Petitioner was charged with perjury in the following respects (there were other charges of perjury of which she was found not guilty):

(1) That she falsely stated the nature of her own previous employment; and

(2) That she falsely stated that she believed herself to be unbiased (R. 1-6).

Petitioner, a married woman with two children, received a summons to report as a juror on August 24, 1931. The summons directed her to report on September 1st, following (R. 2). The case for which appellant was summoned was the case of *United States vs. W. B. Foshay, et al.*, a

celebrated mail fraud case (R. 1, 2).

Petitioner married in January, 1921 (R. 65). Prior to that she had been employed for about three years as a stenographer in the bank of which her husband was president (R. 65, 75). In this connection she worked in the real estate and insurance departments of the bank. She was given the title of assistant cashier (R. 50, 58). This was to enable her to sign cashier's checks and drafts in the absence of other officers (R. 65). After her marriage she continued to work in the bank until August, 1921, when she became pregnant.

Subsequent to her marriage petitioner was temporarily employed on several occasions. While she and her husband were in Florida in 1925-1927, she worked for a short time with a Nash automobile agency (R. 78). Later she did some temporary work for a public stenographer, a Miss Singler (R. 78).

One of the corporations in which the defendants in the criminal case were interested was the W. B. Foshay Company. Petitioner had been temporarily employed by that company, doing some sort of copying work, for ten days in the summer of 1929 (R. 8, 48, 49, 65). During this temporary employment petitioner did not meet any of the defendants and it appears on the record without contradiction that she did not know any of the defendants (R. 9, 44-48, 67). In the years 1922 and 1923, petitioner's husband had had some business transactions and correspondence with one of the defendants, W. B. Foshay, as president of the W. B. Foshay Company, and he had a casual business acquaintance with one of the other defendants (R. 51-58). But petitioner's testimony that she did not know that her husband was acquainted with any of the defendants stands uncontradicted (R. 67).

On September 1, 1931, petitioner appeared in court pursuant to the summons. Prior to her examination she conversed with several other women who were also summoned. The District Court found that at this time she "made the statement to several other women on the panel that she wished to serve on the jury; that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her" (R. 100). As a matter of fact, the only witness to testify that petitioner said she had a "special reason" for wanting to serve as a juror was Mrs. Passer (R. 13). Mrs. Johnson testified that petitioner said "she knew very little about the Foshay case" and had not followed it (R. 21). Mrs. Passer testified that Mrs. Clark said "that she had worked in the Foshay Building, but that she was sure that would not disqualify her for jury service." Mrs. Johnson testified that petitioner "only wondered if" her former employment at the Foshay Company "would disqualify her as a juror" (R. 19). Mrs. Anderson testified that petitioner "thought probably she would not be accepted on account of working there" (R. 91). Mrs. Passer, Mrs. Johnson and Mrs. Anderson were all government witnesses.

It should be noted that Mrs. Passer was a seriously discredited witness. According to her testimony she and Mrs. Clark talked about the criminal case at some length (R. 13), and yet when Mrs. Passer was subsequently examined as a prospective juror she was asked: "Have you ever talked to anybody about the case?" and she answered: "I have never mentioned it to a soul" (R. 90).

Prior to her examination petitioner made an oath "that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial" (R. 2). In the

course of her examination she was asked the following questions and made the following answers:

"Q. Have you yourself ever been in any business of any kind?

A. I have been a stenographer before my marriage, yes.

Q. In what kind of business did you work?

A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency. * * *

Q. And do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?

A. Yes, I do feel that way.

Q. And do you think in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes, I do."

It is on account of the above answers, and those alone, that petitioner has been convicted.

Petitioner was not asked on her *voir dire* by either the Court or counsel *by whom* or *when* she had been employed (R. 16-18).

Petitioner was accepted and sworn as a juror. At her subsequent trial the Court received over objection the testimony of two jurors that during the first week of the trial in the Foshay case petitioner said to them that she had read in the papers that Mr. Foshay had gone East to arrange an $18,000,000 loan and the crash came and he came back without a dollar, and that she believed he was a victim of circumstances (R. 22, 26). The Court also received over

objection testimony of two other jurors to the effect that some time during the course of the trial petitioner said "that she did not have no use for the government, on account that they did not use the soldiers right when they came back from the war" (R. 31, 26). The Court also received over objection testimony as to what petitioner said and did during the deliberations of the jury after the jury had retired; that she said she considered counsel for the government "a very brilliant attorney, and as long as he could not convince her there was no chance of you eleven men to convince me"; that "sometimes she held her hands up over her ears, and it was hard to argue with anyone that won't reply. She said she could not send these seven men to the penitentiary because it would bother her the rest of her life, if she lived to be a hundred years old," etc. (R. 24, 25, 26, 27, 28, 30, 31).

The Court also received over objection testimony to show that petitioner's husband visited her about once a week during the course of the trial, but not after the jury retired to consider their verdict, and testimony intended to establish by inference that petitioner's husband during these visits had discussed one of the government's witnesses with petitioner in such a way as to prejudice petitioner against this witness (R. 34-44, 93-95). Other jurors were visited by members of their families during the same period (R. 29). The woman bailiff in charge of petitioner testified that she heard all the conversations between petitioner and her husband and that it all appertained to domestic affairs (R. 44).

The trial of the Foshay case lasted about seven weeks and the jury were out about one week, being finally discharged on October 23, 1931. The Court received over objection evidence to show that the jury stood eleven for con-

viction and one (petitioner) for acquittal (R. 24).

An information for criminal contempt was filed on November 4, 1931, and a rule to show cause was issued thereon returnable November 9, 1931 (R. 1-6). On the return day petitioner filed a sworn answer positively denying all of the charges (R. 6-10). Counsel for petitioner asked for additional time to prepare for trial, but this was denied and the Court proceeded to hear witnesses on behalf of the government (R. 10-12). At the close of the government's case, however, the Court did grant a continuance for ten days to enable counsel for petitioner to prepare her defense (R. 58, 59).

Petitioner took the stand on her own behalf and denied emphatically that she ever had any special interest in the case, or that she had ever so stated to Mrs. Passer (R. 66). She testified that except for two appearances in traffic court this was her first court experience, and that she was extremely nervous, and that at the time of her examination by Judge Molyneaux, the matter of her previous employment by the Foshay Company did not come to her mind (R. 65, 67). She denied any intention to mislead the Court (R. 68). She asserted the truth of her answers as to bias (R. 67). On cross examination she flatly denied that she had ever criticized the treatment of the soldiers by the government (R. 90).

Perhaps the most significant fact about the testimony in the case is that there was absolutely no evidence of corruption on the part of petitioner and absolutely no evidence affording any motive to petitioner to answer falsely or deceive the Court. This is conceded in the majority opinion in the Circuit Court of Appeals (R. 136).

Petitioner was found guilty and sentenced to six months in jail and to pay a fine of $1,000.00. The District Court

found that while petitioner's answers as to her former employment were not perjury, they were evasive and misleading, and that by reason of her failure to disclose her ten days' employment with the Foshay Company over two years prior to the examination she was guilty of contempt. The District Court likewise found that petitioner's answers as to her bias were "false and untrue" and constituted contempt (R. 99-108).

The Circuit Court of Appeals affirmed the judgment of the District Court but set the sentence aside and remanded the case to the trial court only for the purpose of resentencing (R. 121, 145, 164, 165). The sentence was set aside because under the statute contempt of court may be punished by fine *or* imprisonment but not by both. 28 U. S. C. 385.

Gardner, Circuit Court Judge, dissented in an able opinion (R. 145-164).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

In the event that this Court should grant a writ of certiorari, petitioner intends to urge assigned errors numbered 1 to 24, inclusive (R. 109-113).

SUMMARY OF ARGUMENT.

1. It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

2. It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

3. A juror's failure to volunteer information on his *voir dire* is not a contempt.

4. Perjury by a juror on his *voir dire* is not a contempt unless contumacy is shown.

5. Petitioner's conviction for contempt for committing perjury on her *voir dire* was not proved beyond a reasonable doubt, or even sustained by any relevant evidence.

6. A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

7. The statements and vote of a petit juror during the deliberations of the jury are privileged.

8. The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

ARGUMENT.

First Point.

It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

1. The rule to show cause directed petitioner to show cause on November 9, 1931, which she did by filing a sworn answer (R. 6-9). The rule did not apprise petitioner that a trial would be had on November 9th and a large number of witnesses examined on behalf of the government. Petitioner was only allowed three days in which to procure counsel, prepare her answer, and prepare for trial (R. 10-12). In the meantime it appears that the special assistant to the attorney general of the United States and at least three government investigators had been working on the case (R.

18, 19). There was no good reason why petitioner should be rushed to trial before she was ready.

2. Due process of law in contempt cases, except in cases where a judge knows that a contempt has been committed and inflicts a summary punishment, requires that the accused should have a "reasonable opportunity" to make his defense.

Cooke vs. United States, 267 U. S. 517, 537.
In re Clark, 208 Mo. 121.
Ex Parte Nelson, 251 Mo. 63, 157 S. W. 794.

In *Boyd vs. Glucklich*, 116 Fed. 131, C. C. A. 8, it is said (p. 134):

> "Despatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case."

3. It is no answer that when the government had rested, petitioner was allowed ten days in which to prepare her defense. Petitioner was entitled to a reasonable time for preparation before the trial began. She was entitled to a reasonable time in which to investigate the government's witnesses, prepare on the law, etc. When the continuance for ten days was granted, the damage had already been done and the precipitate haste of the trial court in commencing the trial may account for the fact that petitioner, instead of having a trial on definite issues in accordance with usual rules of evidence and of trial procedure, was subjected to a general inquisition.

SECOND POINT.

It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

1. The District Court and the Circuit Court of Appeals have found petitioner guilty of two items of alleged misconduct: (1) Failure to disclose her ten days' employment by the Foshay Company, which employment was two years prior to her examination; and (2) perjury for stating that she felt unbiased and thought she could base her verdict on the evidence and the law as given to her by the Court. Unless petitioner could be lawfully found guilty of contempt on both of these counts the Circuit Court of Appeals was bound to reverse the judgment of the District Court.

Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 440.

2. The startling fact is that petitioner has been convicted of something claimed to constitute a contempt of which she was not accused. The information alleged that on her *voir dire* she "wilfully and corruptly and contrary to her said oath did swear and depose * * * that she, the said Genevieve A. Clark, had been in business, *but that was before she was married*, and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency; * * * and the said Genevieve A. Clark, in the manner and form aforesaid, *having taken an oath* before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and *contrary to her said oath, did depose*

and state material matters which she did not then believe to be true and did then and there commit *wilful and corrupt perjury;* and the due administration of justice * * * was in fact *thereby* corruptly and unlawfully impeded and obstructed" (R. 3-5). (Italics ours.)

3. The statement in the decision of the trial court that "the information specifically informed Mrs. Clark that she was guilty of contempt on account of her failure to disclose the fact of her employment with the Foshay Company" is not true (R. 4, 106).

4. In a case of criminal contempt in open court where the trial judge *knows* through his senses that a contempt has been committed, there may be a summary conviction. The present is obviously not such a case. In all other cases the alleged contemnor is entitled to all the safeguards imposed by "due process of law." This means all the protection vouched in cases of indictment except the right of trial by jury. Most important of all to a person whose liberty is thus jeopardized is the right to notice of the offense charged.

> *Cooke vs. United States*, 267 U. S. 517, 537. "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or an extenuation of the offense and in mitigation of the penalty to be imposed."
>
> (It appears from the decision that the foregoing would apply to all cases except where summary punishment

is inflicted by the trial judge in open court for a contempt *known* by him to have occurred.)

In *Anargyros vs. Anargyros & Co.,* 191 Fed. 208, the Court said: "While the nicety and precision of an indictment may not be required, the pleadings or affidavit must not only specify clearly the acts which the contemnor will be called to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character."

In *Bates' Case,* 55 N. H. 325, Chief Justice Foster said: "It seems to me to be more appropriate, and it would seem safe enough for the protection of the Court, to adhere as closely as possible to the plan and method of criminal procedure, except in the matter of jury trial. The attachment should be substantially like an indictment, at least, to the extent of giving the respondent sufficient information concerning the nature and particulars of the offense charged; and the rules of evidence, and the presumptions of law applied in criminal cases, should be observed."

In re Clark, 208 Mo. 121, 106 S. W. 990.

Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

As said by the Court below in *Boyd vs. Glucklich,* 116 Fed. 131, 134: "in proceedings involving the liberty of a citizen, he has a right * * * to be informed of the precise claim against him."

5. In the case at bar there was no issue raised as to whether petitioner "deliberately and intentionally concealed her employment with the Foshay Company when she was examined by the Court" (R. 105). Petitioner's counsel presented her case on the theory that if her answers did not constitute perjury as charged, she could not be found guilty.

In her answers respecting her employment there was nothing false; there was therefore no occasion to go farther than to prove that fact and to urge it in argument. It is a shocking departure from an ancient, fundamental and just principle of the common law, that petitioner should be sentenced to jail for an alleged offense as to which no issue was tendered.

6. The majority in the Circuit Court of Appeals reason that although the information charged petitioner with contempt for committing perjury the allegations as to perjury were immaterial, and therefore she might be convicted of some other kind of a contempt (R. 125, *et seq.*). We think an information for contempt must specify the kind of contempt complained of, and that kind of contempt must be proved. This seems so elementary as not to call for further argument.

Third Point.

A juror's failure to volunteer information on his voir dire is not a contempt.

1. Even if petitioner had been charged with concealing her ten days' employment, and even if it were shown that her failure to volunteer such information was deliberate, that would not be a contempt.

2. The measure of petitioner's obligation was her oath "that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial" (R. 2). She was entitled to assume that this oath was the measure of her duty. If a prospective juror sworn to make "true answers," complies with his oath, how can it be said he has de-

ceived the Court? (R. 105.) If such a one is adjudged in contempt of Court, it is the juror rather than the Court who is deceived.

3. There is no authority to be found (other than the decisions in this cause) to support the proposition that concealment by a prospective juror is a contempt.

4. This newly discovered doctrine is a dangerous one. An inexperienced person undergoing the ordeal of a first examination in a case attracting great public interest is all too likely to make a false answer by reason only of inadvertence, or defect of memory. If one may be "laid by the heels" for what he did *not* say, the intent to conceal being discovered wholly by circumstantial evidence, no juror, especially no dissenting juror, is safe.

5. Logically, the doctrine would also be applicable to witnesses. And yet a witness' answer will be stricken, and the witness is subject to reprimand, if the answer is not responsive. It is the function of the examiner to question the witness until each material fact is either affirmed or denied. This is so notwithstanding the fact that the witness is customarily sworn to tell the "whole truth." If the whole matter is not developed, we never heard it asserted that the blame is upon the witness. Yet no reason appears why a greater amount of loquacity should be expected of the prospective juror.

Fourth Point.

Perjury by a juror on his voir dire is not a contempt unless contumacy is shown.

1. Whatever petitioner said or left unsaid was something done in the presence of the trial judge; it was *in facie curiae*. If a contempt, it was a contempt in open court. No one has suggested that there was any disrespect shown, or that any interruption or delay in the proceedings resulted. That petitioner was not considered contemptuous at that time is shown by the fact that she was accepted as a juror.

2. What constitutes a contempt in open court is indicated by the term itself. The conduct must be contemptuous. It must show disrespect.

3. A crime committed in the court room may or may not be a contempt. If one of the onlookers quietly forges another man's name to a check, that is not punishable as a contempt. To constitute the act a contempt it must interfere with the order and decorum in the court room. Otherwise the wrongdoer must be indicted and tried by a jury.

4. The Federal statute on this subject, 28 U. S. C. A. 385, is as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance

by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

5. In *Ex parte Robinson*, 19 Wall. 505, this Court had before it the Act of March 2, 1831, which is almost identical in terminology with Title 28, Sec. 385. The Court made it very clear in its opinion that "misbehavior of any person" in the presence of the Court refers only to misbehavior which is openly contemptuous. The Court said at page 511:

> "It limits the power of these courts (Circuit and District) in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2nd, where there has been misbehavior of any officer of the courts in his official transactions; and 3rd, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised *to ensure order and decorum in their* presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes." (Italics ours.)

See also Prof. Beale, "*Contempt of Court*," 21 Harv. L. Rev. 161.

6. That a crime committed in the court room in the presence of the judge is not *per se* a contempt is forcefully shown by cases dealing with perjury. These cases are controlling here because as has been shown the only contempt charged

against petitioner is for committing perjury on her *voir dire.*

In *Ex parte Hudgings*, 249 U. S. 378, it was held that a District Court has no power to adjudge a witness guilty of contempt solely because in the Court's opinion he is committing perjury. If the same principles as are applicable to a witness apply to a juror on his *voir dire*, that case is controlling in the present litigation. The Court said:

> "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the Court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the Court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury.
>
> "Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. * * * This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both. * * *

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the Court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty. As illustrative of this, see *United States vs. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the Court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

United States vs. Appel, 211 Fed. 495, cited in *Ex parte Hudgings* gives an able presentation of under what circum-

stances perjury may be punished as a contempt. The rule was stated by Judge Hand as follows:

> "The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a *bona fide* effort to answer the questions at all."

Ex parte Hudgings has been followed in *State vs. Muse*, 200 Wis. 460, 229 N. W. 31, where a conviction for contempt for committing perjury was reversed. It was held there was no obstruction to the Court in the performance of its judicial duty even though exposing the perjury consumed a good part of two days. The Court said:

> "The defendant in this case did not refuse to answer any question propounded to him. So far as appears he answered the questions respectfully."

It has been held repeatedly that in order for perjury to constitute contempt of court the testimony must be of such

a character that the judge before whom it is given can *know* judicially that it is false.

Hegelaw vs. State, 24 Ohio App. 103, 155 N. E. 620.
People vs. Stone, 181 Ill. App. 475.
People vs. Hille, 192 Ill. App. 139.
Riley vs. Wallace, 188 Ky. 471, 222 S. W. 1085.
11 *A. L. R.* 342, 352.

7. In the case at bar the conduct of petitioner was not disorderly, contumacious or disrespectful. On the contrary, if there was any inaccuracy or incompleteness in her answers that may well have been due to the fact that she was over-awed by the presence of the Court—the antithesis of contempt.

8. To punish as a contempt that which is not a contempt even though it be a crime is in violation of the Federal Constitution, Article 3, Sec. 2, Clause 3; Amendment 6.

See *Boyd vs. Glucklich, supra.*

Fifth Point.

Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence.

1. The trial court found that petitioner committed perjury in her answers on the subject of bias (R. 106, 107). Mrs. Clark, when examined by the Court as to her qualifications, stated that she *felt* that her mind was then open and free and that she was not biased either one way or the other. She said she *thought* she could follow the evidence, or would try to follow the evidence, and base her judgment on that and the law as given to her by the Court (R. 18).

2. The trial court stated in its decision that this inquiry

was "connected with some difficulty. It is impossible, of course, to ascertain with mathematical certainty the state of her mind when examined as a juror" (R. 106). Nevertheless the Court felt equal to the task and found that the evidence established what Mrs. Clark *felt* and *thought* beyond a reasonable doubt. The finding was directly opposed to the only direct testimony on the question, that of Mrs. Clark herself, and if supported by any evidence at all it was wholly circumstantial in character.

3. The only unfavorable evidence having the remotest bearing upon what petitioner *felt* and *thought* at the time of her examination was testimony as to subsequent statements claimed to have been made by her during the course of the trial of the criminal case and during the deliberations of the jury in that case, and the fact that she voted for an acquittal.

4. The natural effect of a trial is to create sympathy or prejudice in the mind of the juror. Accordingly, testimony that during the course of the trial a juror made statements which might indicate sympathy or bias *at that time* would be most unsatisfactory testimony to prove what the juror *felt* and *thought* at the time of the *voir dire*. *Matter of Cochran*, 237 N. Y. 336, 143 N. E. 212, is squarely in point. There the juror exhibited extreme bias during the deliberations of the jury and refused to vote for a conviction, although he apparently believed the defendant guilty. As to the charge that he falsely stated on his examination as to qualifications as a juror that he had no bias or prejudice, the Court said:

> "We fail to find, however, any evidence whatever from which an inference can be drawn that his answers in this respect were untrue at the time they were made."

5. Accusation of criminal contempt must be supported

by evidence sufficient to convince the minds of the triers beyond a reasonable doubt of the actual guilt of the accused.

Gompers vs. Buck's Stove, etc., Co., 221 U. S. 418.
Michaelson vs. United States, 266 U. S. 42.

6. In the present case the question is whether the facts and circumstances proven were inconsistent with the following theories of innocence:

(1) That petitioner, at the time of her examination, was unbiased, or if she was biased, that it was a case of bias of which she was not *conscious* at the time of her examination. Every trial lawyer knows that cases of unconscious bias on the part of jurors are extremely common; that cases of known bias are exceedingly rare.

(2) That any subsequent statements made by petitioner in so far as they indicated bias were the result of her sympathies having been swayed by the proceedings at the trial.

(3) That petitioner voted for an acquittal because she was not convinced that the evidence showed the defendants to be guilty beyond a reasonable doubt, and that in so voting she was dominated not by some mysterious dominating will, alluded to in the trial court's opinion (R. 107), but by her oath as a juror and her own conscience.

Sixth Point.

A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

1. It has long been the established rule in perjury cases that the falsity of the language assigned as perjury, the *corpus delicti* of the crime, must be proved by the sworn and

direct testimony of two living witnesses, or of one witness and by corroborating circumstances.

Wigmore on Evidence, Secs. 2040-2043.

The rule has been explained as being necessary to protect honest witnesses from intimidation in order that voluntary evidence for the purposes of justice will be forthcoming.

Id., Sec. 2041.

2. In *United States vs. Wood*, 14 Peters 430, the rule was approved in the following language (p. 440):

> "It is a right rule, founded upon that principle of natural justice which will not permit one of two persons, both speaking under the sanction of an oath, and presumptively entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow."

In *United States vs. Wood*, the Court held that the rule was applicable where "oral testimony is exclusively relied upon" but was not applicable where the perjury could be proved "by documentary or written testimony springing from" the accused "with circumstances showing the corrupt intent."

3. The rule has been given recent sanction by this Court in *Hammer vs. United States*, 271 U. S. 620. There the Court said (p. 626):

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence

of such legislation indicates that it is sound and has been found satisfactory in practice."

4. In the case at bar no witness contradicted petitioner's testimony as to what she felt and thought at the time of her examination. There was no documentary evidence bearing on the question. The finding of perjury was, therefore, contrary to the rule, and not within the only exception to the rule acknowledged by the Supreme Court of the United States.

5. The rule is firmly established in the federal courts that a conviction for perjury based upon circumstantial evidence cannot be sustained. In *Clayton vs. United States*, 284 F. 537, the fourth circuit reviewed a conviction for perjury on account of testimony given before the grand jury. The testimony asserted to be false was to the effect that the accused had not been in possession of liquor during a certain period and that he had not been drunk during a certain period. The conviction was based upon the testimony of two witnesses as to what the accused had told them in private conversations prior to the time he had testified as indicated (infinitely stronger proof of perjury than can be found in the present record). The conviction was reversed. The Court said (p. 540):

> "This was quite insufficient, for the falsity of a sworn statement is not shown by proof of an unsworn contradictory statement. In view of the strong presumption of innocence and because of the solemnity of his oath, credit must be given to what defendant said under oath, rather than what he may have said to the contrary when not under oath."

Other cases holding that a conviction of perjury cannot be

had on circumstantial evidence are:

Allen vs. United States, 194 Fed. 664 (C. C. A. 4).
Sullivan vs. United States, 161 Fed. 253 (C. C. A. 1).
Canal Zone vs. Kerr, 2 Canal Zone Sup. Ct. 262.
See also cases collected in 15 *A. L. R.* 634, 637.

6. In a proceeding for criminal contempt based upon perjury it would seem that the defendant, being deprived of the protection which a trial by jury affords, should not be convicted by less reliable evidence than is required in cases of indictment for perjury.

Seventh Point.

The statements and vote of a petit juror during the deliberations of the jury are privileged.

1. We believe it has long been the general understanding of both bench and bar that communications made by a juror in the jury room are absolutely privileged.

2. *Wigmore,* in his *Work on Evidence,* states that a communication is privileged where four requirements are met (Sec. 2285):

> "(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

3. With reference to the privileged character of communications by jurors in the jury room the same learned author says (Sec. 2346):

> "The requirements of the general principle of privileged communications (*ante* §2285) are fully satisfied for communications between jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to the due attainment of a jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and most careful protection; and the injury from disclosure would certainly overbalance the benefits thereby gained. It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow juror disclosed upon the witness stand against his consent."

4. *Jones*, in his *Commentaries on Evidence*, 2nd Ed., Sec. 2212, says:

> "It is essential to the due administration of justice that jurors should understand that their deliberations in the jury room are inviolable, and that the reasons for their verdict cannot be questioned."

5. *Hughes*, in his *Work on Evidence*, says (p. 301):

"The deliberations of petit jurors, while engaged in seeking to reach a verdict, are also privileged." (Page 302:) "On the ground of public policy, freedom of expression in the jury room is absolutely essential. It follows, therefore, that the rule of privilege is applicable in the full sense of the term to the deliberations of petit jurors. This principle has always obtained."

6. A multitude of decisions hold that a verdict may not be

upset by testimony of a juror as to his own or his fellow's misconduct in the jury room. See cases collected in note 2 to *Wigmore on Evidence,* Sec. 2349. These decisions are not always grounded upon the same principle. Of course, where a juror offers to show his own misconduct during the deliberations of the jury the question of privilege would not be raised. But where it is proposed to show by one juror what was said by another, in order to impeach the verdict, the privilege is applicable, and it will be found on examination that many of the decisions holding that a verdict may not be impeached by testimony of the jurors are rested on this ground.

See *Wigmore on Evidence,* Secs. 2348-2354.

7. In *Woodward vs. Leavitt,* 107 Mass. 453, a leading case, it was held that what was said and done by a juror in a jury room would not be received to rebut the charge, on a motion for new trial, that the juror was biased at the time he was sworn. The Court said (p. 460):

> "It is essential to freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty." (Page 463:) "The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions."

Woodward vs. Leavitt is illustrative of the cases which hold that deliberations in the jury room may not be disclosed even where no attempt is made to impeach the verdict.

See also *Hewitt vs. Chapman,* 49 Mich. 4.

8. On this phase of the case the lower courts have relied upon a *dictum* in *McDonald vs. Pless*, 238 U. S. 264, 269 (R. 107). In that case it was held that testimony of jurors would not be received to show *misconduct* in the jury room (a quotient verdict). The principle the Court there laid down was that the testimony of jurors would not be received to show their own or their fellows' misconduct in the jury room in order to impeach the verdict. The *dictum* that this principle

> "is limited to those instances in which a private party seeks to use a juror as a witness to impeach a verdict"

has no application to the case at bar. This observation had reference to whether *misconduct in the jury room* might be shown in cases where no attempt was made to impeach the verdict. The question of privilege was not before the Court or considered by it. Here we are concerned with whether what was said by a juror in the jury room may be used against him to prove an alleged wrongful act at some other time and place.

9. The case of *In re Nunns*, 188 App. Div. 424, 176 N. Y. Supp. 858, holds that statements made by jurors in a jury room may be shown to prove prior misconduct, but not

> "deliberations of the jury upon the case as presented to them by the evidence."

Even the doctrine of this decision does not go to the length of justifying what was done in the case at bar. Two judges dissented in the Nunns case and to us the dissenting opinion is the more convincing.

10. The decision in *In re Nunns* is repudiated in *Matter of Cochran*, 237 N. Y. 336, 143 N. E. 212. There a juror had been held in contempt of court on two grounds: First, for

alleged untrue statements made by him on his examination as to his qualifications as a juror, in that he stated that he had no bias or prejudice that would affect his decision and that he knew of no reason why he could not fairly try the case; second, improper conduct in the jury room in that he stated facts to be in evidence as to which no testimony had been given and refused to vote for a conviction although he believed the defendant guilty, etc. The conviction was reversed. The Court said that a juror might not be punished on account of the verdict, and held:

> "It is not alone as to the final result—the verdict—that they are protected. Public policy requires that they be given the utmost freedom of debate as it requires it in the case of the legislature."

11. The pernicious effect of denying the privilege of secrecy to a juror is shown by what has happened in the present case. A disagreement by a jury usually results in hostility between the opposing camps and frequently in anger on the part of the judge whose calendar is thereby clogged. Where the disagreement is produced by a single dissenting vote this hostility and anger is apt to be all the more pronounced, and this is particularly so where the minority juror is a woman who has dared to oppose her opinion to that of eleven infallible men. In addition, in the case at bar, between the disagreement of the jury and the trial of the contempt charges, there was an unparalleled barrage of newspaper comment unfavorable to Mrs. Clark. The trial court took notice of this for it said in its decision:

> "Mrs. Clark has brought upon herself the contempt of the community in which she lives—not because she voted for the acquittal of the defendants—but because her vote was not believed to represent her honest con-

victions based on the evidence and the law" (R., 104, 107).

12. Under such circumstances we submit that the testimony of the other jurors is not likely to present a fair account of what happened in the jury room. The minority juror will be lucky if he only has to meet exaggerated testimony, and not downright perjury. The present record offers a very one-sided account of what happened in the jury room, as petitioner offered no testimony on that subject. If what is said in the jury room can be used to convict a juror of contempt of court for stating that he was unbiased on his *voir dire*, then no dissenting juror is safe.

Eighth Point.

The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

1. If the trial court had not considered and relied upon the evidence erroneously admitted, then the error in receiving such evidence might not call for a reversal. But the fact is that the trial court in convicting Mrs. Clark relied to a very large extent upon what she is claimed to have said and done in the jury room and upon the fact that she voted for an acquittal. It is said in the opinion—

> "during the deliberations of the jury, after the case was finally submitted, she announced that since Mr. Horowitz had been unable to convince her of the guilt of the defendants, the other jurors could hardly expect to do so. She virtually closed her ears to the arguments of other jurors, and made a statement with respect to the Government's witness Cobel, the effect of which was to

charge him with having given perjured testimony in a case in the south in an attempt to convict an innocent man. * * * Mrs. Clark, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. She also made statements to the effect that she could not vote to send seven men to the penitentiary. The jury were out for approximately one week and stood eleven for conviction, and one (Mrs. Clark) for acquittal."

Reference is also made in the opinion to petitioner's unyielding attitude in the jury room (R. 101, 102, 107).

2. The fallacy in the decision of the Circuit Court of Appeals on this phase of the case is almost conclusively demonstrated by Judge Gardner in his dissenting opinion (R. 163).

CONCLUSION.

In *Bushell's Case*, Vaughan 135, in the year 1670, it was established that a juror may not be punished on account of his vote or verdict, and this principle has ever since been considered essential to the maintenance of the constitutional right of trial by jury. Yet the decisions of the courts below raise a grave question whether this juror is not being punished, by indirection, because she refused to convict. This suggestion is made because it seems fantastic to contend that proof was made beyond a reasonable doubt that petitioner committed perjury in stating what she *felt* and *thought* on her *voir dire*.

Moreover a grave question is presented whether the decisions of the lower courts do not disclose, in an undue extension of the contempt power, a judicial encroachment upon the lawful domain of the jury.

Certainly if the decisions of the courts below are sound law, jury service by independent thinking men and women is much more hazardous than it has heretofore been supposed to be. In the language of this Court in *Sinclair vs. United States*, 279 U. S. 749, 765:

> "If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust."

Respectfully submitted,

SIGURD UELAND,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 531.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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PETITIONER'S SUPPLEMENTAL BRIEF TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 99-108) is reported in 1 F. Supp. 747. The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 695.

STATEMENT.

For brevity reference is made to the statement in petitioner's brief in support of the petition for certiorari.

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Petitioner intends to urge assigned errors numbered 1 to 24, inclusive (R. 109-113).

SUMMARY OF ARGUMENT.

1. It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

2. It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

3. A juror's failure to volunteer information on his *voir dire* is not a contempt.

4. Perjury by a juror on his *voir dire* is not a contempt unless contumacy is shown.

5. Petitioner's conviction for contempt for committing perjury on her *voir dire* was not proved beyond a reasonable doubt, or even sustained by any relevant evidence.

6. A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

7. The statements and vote of a petit juror during the deliberations of the jury are privileged.

8. The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

9. Petitioner's sworn answer and positive testimony that she did not intend to mislead the court, and that she answered truthfully with respect to her freedom from bias were conclusive.

ARGUMENT.

First Point.

It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

In addition to the argument already presented on this point in petitioner's brief in support of the petition for certiorari, petitioner suggests the following:

1. The rule to show cause was served on petitioner only five days before the return day (R. 6, 10). Under Rule 6 of the District Court of Minnesota eight days' notice is the usual minimum. Rule 6 (2) reads as follows:

> "All notices of motion and orders to show cause requiring service, shall be served eight days before the time appointed for the hearing, unless the Court, by order, prescribes a shorter time, or unless otherwise provided in these rules."

As no reason appeared for haste, the fact that a shorter period was allowed calls for comment, as it tends to characterize the entire proceeding as well as to support petitioner's contention that she was not allowed a reasonable opportunity to make her defense.

2. The procedure in cases of criminal contempt (other than those committed in the face of the court so as to call for summary punishment) is stated by *Blackstone*, 4 *Commentaries* 286, as follows:

"If the contempt be committed in the face of the Court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance and of which the Court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does, if no sufficient cause be shown to discharge; and thereupon the Court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the Court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the Court be exhibited within the first four days; and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the Court to have it struck out. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury."

This practice of issuing a rule to show cause was approved by Chief Justice Taft in *Cooke vs. United States*, 267 U. S. 517, 537, in the following language:

"In such a case, and after so long a delay, it would

seem to have been proper practice, as laid down by *Blackstone*, 4 *Commentaries* 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged."

While the practice of trying a charge of criminal contempt on interrogatories is not now generally followed, the purpose of the rule to show cause is still as in Blackstone's time, to bring the defendant into court to answer or plead. In our system of law the answer follows the complaint, the arraignment and plea follow the indictment or information. In other words, the issues are first framed. In the present case the information or petition and the rule to show cause only indicated that this customary procedure would be followed (R. 5, 6). The question now submitted to this Court is whether it was reasonable or fair, in view of the uncontradicted assertion by petitioner's counsel that he was not ready (R. 10-12) to proceed to trial *immediately* after petitioner filed her answer and plea of not guilty.

3. While the procedure in criminal contempts under U. S. Code, Title 28, Sec. 385, is not governed by statute, the Clayton Act, in dealing with a limited class of contempts, has given statutory recognition to the customary and proper mode of procedure. Under this statute an "affidavit of some credible person," or an information by a district attorney "that there is reasonable ground to believe" that some person has been guilty of contempt is first filed. Thereupon the court issues a rule to show cause—

> "upon a day certain why he should not be punished therefor, which rule, together with a copy of an affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to

prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the Court, the alleged contempt be not sufficiently purged, *the trial shall be at a time and place fixed by the Court.*" (Italics ours.)

U. S. Code, Title 28, Sec. 387.

4. In criminal cases triable by jury it is well settled that it is a violation of a fundamental right to proceed to trial over a prisoner's objection immediately after the plea of guilty.

16 *C. J.* 449:

"Every person accused of crime and his counsel are entitled to a reasonable time in which to prepare for trial after an accusation of crime is made; and a failure to afford this right is neither consonant with a sense of justice nor a fair and impartial administration of the law." (Citing many cases.)

In cases of criminal contempt there is more cogent reason for not proceeding to trial immediately following the answer. The defendant in a contempt proceeding who is ordered to show cause may not unreasonably expect that sufficient cause may be shown to discharge, or that his answer will purge himself of the contempt, and that there will be no trial.

5. The right of a defendant charged with criminal contempt to be represented by counsel having been established by this Court in *Cooke vs. United States*, 267 U. S. 517, the right to reasonable time to prepare for trial follows as a necessary incident to that right. This has been shown (and conceded in the dissenting opinion) in the recent decision of *Powell vs. State of Alabama*, 53 S. Ct. 55. In that case

this Court referred to the period from the time of the arraignment of the defendants until the beginning of their trial, a period of six days, as—

> "perhaps the most critical period of the proceedings against these defendants * * * when consultation, thorough-going investigation and preparation were vitally important * * *."

The Court also said, which seems applicable to the case at bar:

> "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

Second Point.

It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

It is urged in the Brief for the United States in opposition to the petition for certiorari that petitioner's conviction must stand even though she was convicted of a contempt not charged in the information for the reason that she was also convicted for something which was charged in the information, *i. e.*, for committing perjury in her answers as to her own bias (see p. 21). This would amount to sending the cause back to the District Court with instructions to punish petitioner on two counts, whereas she could only be

guilty of one. Such a notion has not only been repudiated in *Gompers vs. Buck's Stove & Range Co.*, 221 U. S. 418, 440, cited on petitioner's original brief, but also in *Toledo Newspaper Co. vs. United States*, 247 U. S. 402, 421.

THIRD POINT.

A juror's failure to volunteer information on his voir dire is not a contempt.

On this point we have nothing to add to what was stated in petitioner's original brief.

FOURTH POINT.

Perjury by a juror on his voir dire is not a contempt unless contumacy is shown.

On this point we have nothing to add to what was stated in petitioner's original brief.

FIFTH POINT.

Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence.

On this point see petitioner's original brief and what is stated under the Eighth Point, *infra*.

SIXTH POINT.

A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

In the Brief for the United States in opposition to the

petition for certiorari, it is urged that the rule as to proof of perjury is not applicable in a criminal contempt proceeding even though the offense charged in such proceeding is the commission of perjury.

While criminal contempts are said to be *sui juris*, this Court has held that in cases of criminal contempt the defendant is entitled to notice of the charge, reasonable opportunity to defend, the assistance of counsel, and the right to call witnesses. *Cooke vs. United States*, 267 U. S. 517. It is likewise held that a criminal contempt is an "offense against the United States" within the meaning of Article II, Sec. 2, Clause 1 of the Constitution and pardonable by the President thereunder. *Ex parte Grossman*, 267 U. S. 87. It is likewise held that such a proceeding "is a criminal case" within the meaning of the Criminal Appeals Act, U. S. Code, Title 18, Sec. 682. *United States vs. Goldman*, 277 U. S. 229. It is likewise established that in criminal contempt the defendant can only be convicted by proof beyond a reasonable doubt and cannot be compelled to testify against himself.

Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 444.

Michaelson vs. United States, 266 U. S. 42, 66.

It is likewise determined that a proceeding for criminal contempt is barred by the Statute of Limitations with respect to offenses not capital.

U. S. Code, Title 18, Sec. 582.

Gompers vs. United States, 233 U. S. 604.

In the case last cited Mr. Justice Holmes said, at page 610:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the

> amendments giving a right to trial by jury, etc., to persons charged with such crimes * * *. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

In view of these decisions, and in view of the fact that a defendant in a criminal contempt proceeding is placed in jeopardy of imprisonment for a period of time to which the law sets no precise limitation, it seems there is no merit in the Government's position. Where the law requires a fact to be proved by a certain kind or quantum of evidence, it would be a gross injustice if the same kind or amount of proof were not required in criminal contempt proceedings, where the additional safeguard of a jury trial is wanting. The rule as to perjury was applied by this Court in *Hammer vs. United States*, 271 U. S. 620, which was an indictment for subornation of perjury. We are unable to see why it should not also be applied in any criminal proceeding where perjury must be shown to sustain the charge.

Seventh Point.

The statements and vote of a petit juror during the deliberations of the jury are privileged.

Under this point we have nothing to add to what is said in petitioner's original brief.

Eighth Point.

The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

1. It is contended that even though testimony relating to petitioner's actions and utterances in the jury room should not have been admitted, it does not follow that her conviction should be reversed, there being sufficient other evidence to support the conviction. Reliance is placed on what was said by this Court in *Sinclair vs. United States*, 279 U. S. 749, 767. See page 32 of Brief for the United States in opposition to the petition for certiorari.

In the Sinclair case this Court quoted with approval from *The United States vs. King*, 7 How. 833, 854, 855, where it was held that a reversal was not called for because evidence objected to and received was not admissible "in some unimportant particulars." *The United States vs. King* was a civil action in Louisiana in the nature of an action in ejectment tried before a court without a jury. The rule there laid down and approved in the Sinclair case is conceded to be correct. Where a trial is before a judge without a jury minor errors in omitting evidence may not call for a reversal if it can be fairly presumed that the trial judge disregarded the incompetent evidence. Where, however, it appears from the court's decision that the improper evidence greatly influenced the court in arriving at its judgment, an entirely different question is presented. In an equity cause where the appellate court tries the matter *de novo*, it may be that there might still be an affirmance. But in a criminal proceeding the appellate court does not, of course, attempt to do this. In the case at bar the Circuit Court of Appeals in its decision stated that if the evidence as to the deliberations

in the jury room were deleted "the record * * * is sufficient to sustain the conviction" (R. 144). But the Circuit Court of Appeals could only *guess* as to what would have been the judgment of the District Court if such deletion were made. To sustain a conviction based, to a very great extent, on evidence improperly received, because of other evidence in the record which might have influenced the Court below, is to sustain a conviction which in fact was never made.

It is noteworthy that in *Sinclair vs. United States*, 279 U. S. 749, this Court did reverse the conviction as to one defendant, William J. Burns. The Court said (p. 761) that the evidence—

> "might reasonably cause one to suspect William J. Burns was a party to the surveillance. But he emphatically denied this and we can find no material evidence to support the charge against him. As to him, the judgment below must be reversed."

Likewise in the case of *In re Watts & Sachs*, 190 U. S. 1, the Court reversed a conviction for contempt because incompetent evidence had been received and the Court was of the opinion (p. 35)—

> "that there was no legal evidence to sustain these convictions for contempt."

See also *Gridley vs. United States*, 44 F. (2d) 716, 742 (C. C. A. 6th).

In *Craig vs. Hecht*, 263 U. S. 255, 279, it was said:

> "But the law gives the person convicted of contempt * * * the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceeding, and

> if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

A conviction based upon testimony improperly received is not in reality reviewed on either the facts or the law unless either the appellate court proceeds to try the case *de novo* and itself renders judgment on the evidence properly in the record or the judgment below is reversed.

2. If the evidence improperly received be deleted from the record, even assuming that the rule as to proof of perjury is inapplicable (see petitioner's Sixth Point, *supra*), there would remain no evidence tending to sustain the conviction. As shown under petitioner's Seventh Point the deliberations of the jury and petitioner's vote could not be considered. Likewise, as shown under Fifth Point in petitioner's original brief, what petitioner said and did during the course of the trial was too remote to prove conscious bias or an intent to deceive the Court at the time of the *voir dire*.

Testimony intended to prove that petitioner might have been improperly influenced after the trial began could have no relevancy as to whether or not she committed perjury or intended to deceive the Court on her *voir dire*. Evidence that she was influenced after she was sworn as a juror would rather weaken the claim that she knew she was biased or intended to deceive the Court when she was examined as to her qualifications. Yet the Court received all this testimony and was influenced by it (R. 34-44, 93-95, 101, 102; see also R. 106, 107).

Hence petitioner's conviction must be rested on the fact of her ten days' employment by the Foshay Company, more than two years prior to her examination, and upon her conversation with three other women, one of whom was seriously discredited, concerning whether she wished to serve as a

juror and whether she would be accepted on account of her previous employment at the Foshay Company (see petitioner's original brief, p. 9; R. 13-16, 19-21, 66, 90-92).

On the testimony of the Government's witnesses it clearly appears that petitioner expected her employment at the Foshay Company to become known to the Court. Doubtless she expected that the Judge or counsel would ask *by whom* she had been employed. It is hardly possible that if she intended to conceal this prior employment from the Court she would have freely discussed it, as testified to by the Government's witnesses, with strangers shortly prior to her examination.

It is conceded that there was no evidence of corruption on the part of petitioner. It appears to be conceded that there is no evidence affording her a motive to answer falsely or deceptively (see Brief for the United States in opposition to petition for writ of certiorari, p. 16). It is established that there is not "one scintilla of evidence" that the defendants in the Foshay case or their counsel attempted to influence petitioner (R. 107). It is established that petitioner did not know any of the defendants in the criminal case (R. 104, 105). It seems to us that her conviction was founded upon an ungenerous suspicion and must be reversed. As stated by the Court below in *Boyd vs. Glucklich*, 116 Fed. 131, 140:

> "The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass. No man can be imprisoned for a constructive contempt on suspicion or conjectures or upon inferences which may or may not be well founded. For this reason from the earliest times the doctrine has obtained that when one accused of a constructive contempt in a court of law denies positively and specifically the alleged contempt,

under oath, the proceeding against him for contempt must be dismissed."

NINTH POINT.

Petitioner's sworn answer and positive testimony that she did not intend to mislead the Court, and that she answered truthfully with respect to her freedom from bias were conclusive.

1. On the return day petitioner filed a sworn answer in which she stated positively that she did not have in mind her employment at the Foshay Company at the time of her examination by Judge Molyneaux, and in which she stated positively that her answers on the subject of bias were true (R. 8, 9). On the trial she likewise testified to the same effect (R. 67, 68).

2. It was formerly the law that a person charged with a contempt of which the Court did not have judicial knowledge, could purge himself of the contempt in all cases by denying the commission of the contempt under oath.

> "If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury."
>
> 4 *Blackstone, Commentaries*, 287.

3. This rule has been since modified in cases where the contempt consists of overt acts which of themselves prove a contempt.

United States vs. Shipp, 203 U. S. 563.

But where the act charged as a contempt is ambiguous, that is, where the commission of a contempt depends upon the intent with which an ambiguous act was done, the right to purge the contempt under oath still exists. In *United*

States vs. Shipp, supra, the Supreme Court said (p. 574):

> "It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts."

4. In *Boyd vs. Glucklich*, 116 Fed. 131, the Court below said (p. 141):

> "The doctrine thus laid down is still the rule followed by courts of common law; those courts uniformly holding that, if one accused of a constructive contempt fully answers all the charges on his oath, he must be discharged; the answer must, for the purpose of the contempt proceedings, be taken as true, and extrinsic evidence cannot be received to impeach it. And this is the doctrine in the federal courts." (Citing *U. S. vs. Dodge*, 2 Gall. 313, Fed. Cas. No. 14,975, and *In re Pitman*, 1 Curt. 186, Fed. Cas. No. 11,184.)

Since the decision in *United States vs. Shipp*, the same Court has intimated that the doctrine is applicable in cases "where the contempt inheres in the intent with which an ambiguous act was done." *Conley vs. United States*, 59 Fed. (2d) 929, 935.

See also *Hughes vs. People*, 5 Colo. 436.
Fishback vs. State, 131 Ind. 304, 30 N. E. 1088.
In re Chadwick, 109 Mich. 588, 67 N. W. 1071.
Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.
Percival vs. State, 45 Neb. 741, 64 N. W. 221.
State vs. New Mexican Printing Co., 25 N. M. 102, 177 Pac. 751.

The acts on account of which petitioner has been convicted were not in and of themselves contemptuous and only an

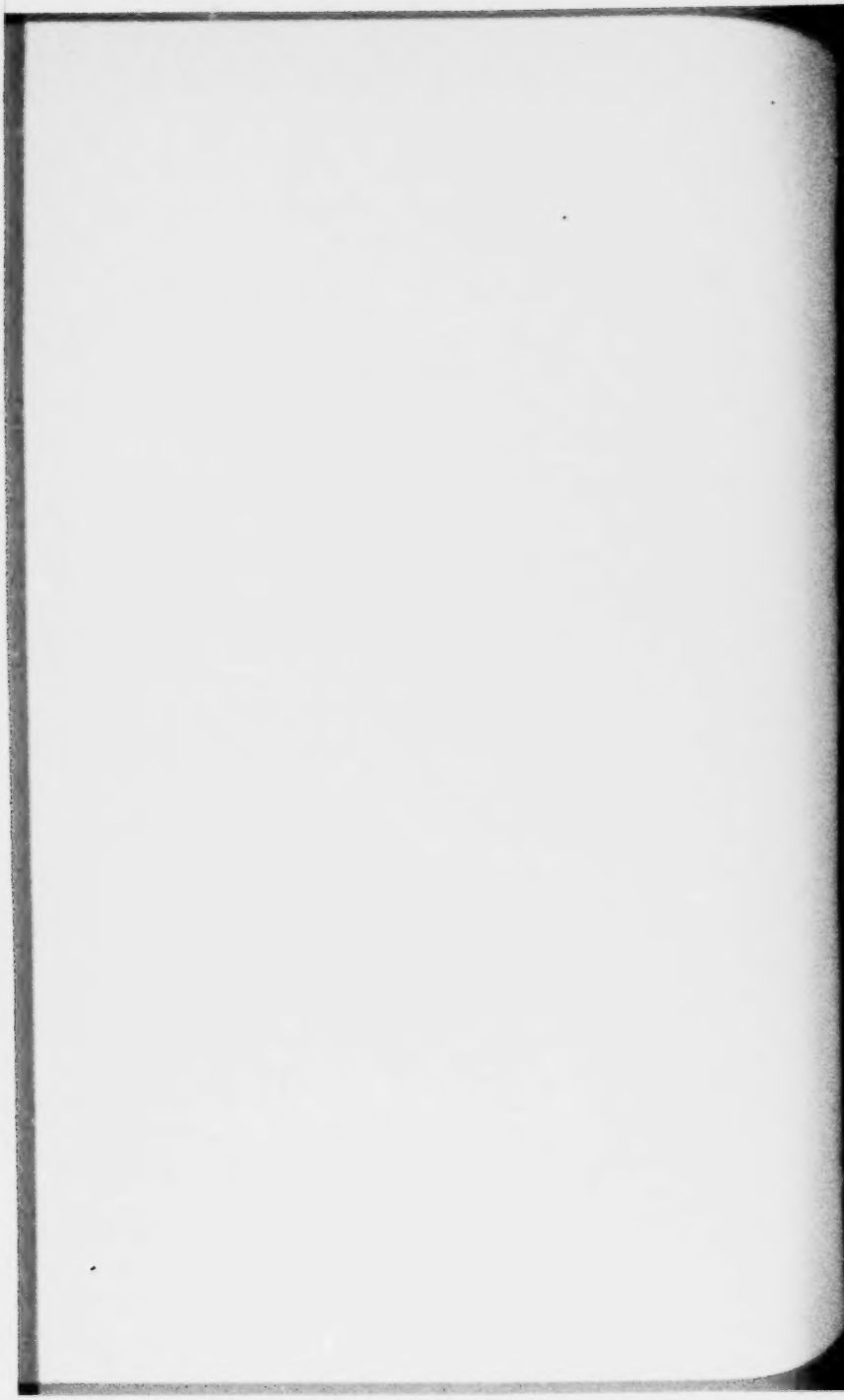
unlawful intent on the part of petitioner could under any view render them such. Accordingly the remainder of the old rule applies.

Respectfully,

SIGURD UELAND,

Attorney for Petitioner.

January, 1933.



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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 531

GENEVIEVE A. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the District Court (R. 99–108) nor those in the Circuit Court of Appeals (majority, R. 121–145; dissenting R. 145–164) have yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1932. (R. 164.) The petition for certiorari was filed November 28, 1932. While she does not so state, petitioner presumably

invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court denied petitioner due process by proceeding to trial on the return day of the rule to show cause why she should not be adjudged in contempt.

2. Whether the petition for the rule sufficiently apprised the petitioner herein of the charge upon which she was subsequently convicted.

3. Whether petitioner's responses to certain questions asked her by the trial court in her examination on the *voir dire* touching her qualifications as juror in a criminal trial constituted criminal contempt.

4. Whether the testimony of petitioner's fellow jurors concerning her utterances and actions during their deliberations after the case had been submitted to them was erroneously admitted in evidence.

5. If so, whether there was sufficient evidence outside of this testimony to warrant conviction.

6. If there was sufficient evidence outside of such testimony to warrant conviction, whether the conviction must nevertheless be reversed because of the admission of this testimony, even though the case was tried to the court without a jury.

STATUTE INVOLVED

Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385) provides:

> The said courts [courts of the United States] shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On November 4, 1931, the Government filed in the United States District Court for the District of Minnesota a petition (R. 1–6), which alleged that on September 1, 1931, there came on for trial in that court an indictment which had been returned against one Wilbur B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud (R. 1–2). According to this petition the petitioner herein (hereinafter called the defendant) was one of the jury panel sum-

moned in connection with this trial. (R. 2.) When she was called for examination on her *voir dire* she took the following oath: "You do solemnly swear that you will true answers make to such questions as may be put to you touching upon your qualifications and competency to sit as a juror in this case." (R. 2, 146.) A number of questions were then asked her by the United States District Judge who presided at the trial. (R. 3.) These questions and the defendant's answers are set forth verbatim at R. 16–18 and also in the dissenting opinion at R. 146–147. The petition alleged that there were, among others, five topics of inquiry which had a material bearing upon the defendant's qualifications and competency to sit as a juror. (R. 2–3.) It then gave a detailed summary of defendant's answers upon these subjects (R. 3) and alleged that these answers were not in accord with the truth in certain particulars (R. 3–4). The petition concluded with the prayer that the defendant be required "to appear in this Court in person at a day certain and show cause why she should not be held in contempt * * * in consequence of her said contemptuous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt." (R. 5.)

A rule to show cause was issued in response to this petition. (R. 6.) The rule was dated the same day that the petition was filed, and directed the defendant to "appear in person and show cause,

before this Court, if any she has, on the 9th day of November, A. D. 1931, at ten o'clock A. M., or as soon thereafter as the matter may be heard, why she should not be adjudged in contempt of the authority of this Court as prayed in said petition." It also directed that a certified copy of the petition and of the rule be served upon the defendant on or before November 6, 1931. The rule was served on the day it was issued, November 4, 1931 (R. 10), and, together with the Marshal's return showing that he had served the writ, was filed in the District Court on November 6, 1931. (R. 6.)

In response to the rule to show cause the defendant on November 9, 1931, filed an answer (R. 6–10), which, among other things, denied that any answer or answers made by her upon her *voir dire* examination impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the Foshay trial (R. 9).

The proceeding came on for hearing on November 9, 1931, before a court composed of two district judges (District Judge Nordbye and District Judge, afterward Circuit Judge, Sanborn, neither of whom had presided at the Foshay trial). While counsel for the defendant was willing to proceed with the hearing if it involved merely the examination of the defendant, he objected to a general trial of the issues in controversy on the ground that the time which had elapsed since the service of the rule to show cause

had been devoted to the preparation of the defendant's answer and that he had had insufficient opportunity to prepare for an extended trial. The court ruled, however, that the Government should proceed with its evidence, as a continuance at that time would not be of much avail to the defendant, and that if it should appear that the defendant needed further time when the Government had concluded its evidence, the matter of continuance would then be given consideration. To this ruling defendant noted an exception. (R. 12.)

The Government then proceeded with its evidence. Most of the Government's witnesses were subjected to vigorous cross-examination by defendant's counsel. (R. 13–58.) The Government's testimony apparently consumed the morning of November 9th, because after the Government had rested the defendant's counsel stated (R. 58): "I repeat what I said this morning. I have not had adequate time to prepare this case, and I would like time to present the respondent's case." In response to this request the court continued the matter until November 19th. The court also said that it was "particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary to the defense to properly present such additional facts that the Court should have." (R. 59.)

Pursuant to the court's order the matter again came on for hearing on November 19th. No request for a further continuance was made on behalf of defendant, and her counsel proceeded with the introduction of evidence for the defense. (R. 59–90.) The defendant took the stand in her own behalf and was given full opportunity to explain her conduct dealt with in the charges which had been made against her. (R. 62–90.) After the defendant had rested the Government introduced the testimony of several witnesses in rebuttal. (R. 90–96.)

Certain motions were then interposed by the defendant and taken under advisement. The arguments by counsel followed, and the proceeding was adjourned until December 26, 1931, at which time the court filed its findings and conclusions (R. 99–108) and pronounced its sentence (R. 98). The court found the defendant guilty of contemptuous conduct with respect to two of the subjects of inquiry in her examination upon the *voir dire* and sentenced her to imprisonment in a county jail for a period of six months and to pay a fine of $1,000.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment finding the defendant guilty of contempt was affirmed, but the sentence was set aside and the case remanded for resentencing on the ground that Section 268 of the Judicial Code (*supra,* p. 3) made provision for

fine *or* imprisonment only (R. 121–145, 165). Circuit Judge Gardner dissented. (R. 145–164.)

As the courts below held that the defendant's conduct was contemptuous in respect of only two of the matters under inquiry when she was examined by the District Judge on her *voir dire,* we will discuss the evidence and findings of the District Court only in so far as they bear upon those two matters. The portion of the questions and answers at that examination upon which her conviction was based are as follows (R. 17, 18):

> (1) Q. Have you yourself ever been in any business of any kind?
>
> A. I have been a stenographer before my marriage, yes.
>
> Q. In what kind of business did you work?
>
> A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency.
>
> * * * * *
>
> (2) Q. Well, do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?
>
> A. Yes, I do feel that way.
>
> Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?
>
> A. Yes; I do.

According to the findings of the District Court, as supplemented by the evidence wherever such evidence tends to throw additional light upon the pertinent facts, the defendant was at all the times here material a resident of Minneapolis, Minnesota, and the wife of D. D. Clark. On August 24, 1931, she received a summons to report as a juror on September 1, 1931, at the Federal building at Minneapolis. The jurors who were summoned to report on that day were all called in connection with the trial of the *Foshay case*. At the time she received this summons it does not appear that she knew for what case she had been called. (R. 99.) She testified that shortly after receiving the summons she called up her sister, a Mrs. Brown, who was a clerk in the Naturalization Service and had an office in the Federal building in St. Paul (R. 61) and told her of having received the summons (R. 63). Her sister asked her if she was glad to receive the summons and she replied, "Yes," but that she was sorry it had come at that time, as she was " halfway " expecting a guest to be with her in the first week of September. (R. 61, 63.) She appears also to have asked this sister whether there was any way she could get a postponement or be excused. (R. 61.) In a subsequent telephone conversation the defendant's sister advised her that she had been to the office of the District Court clerk and had been told that it would be necessary for the defendant to appear in court on September

1st if she wished to ask to be excused (R. 61, 63, 99), but she did not make any such request when she appeared at the Federal Court in response to the summons. (R. 84.) Her sister further informed her that the trial for which she had been summoned was the Foshay trial and that she would probably be disqualified, as she had been employed by the Foshay Company. (R. 61–62, 99–100.) Her sister testified that defendant was also of the same opinion (R. 62), although at the hearing the latter denied that she had any recollection of talking with her sister on the question of her disqualification (R. 72).

The defendant appeared at the court room on the morning of September 1st. (R. 100.) The examination of the jurors as to their qualifications was conducted by District Judge Molyneaux, who presided at the Foshay trial. (R. 63, 100.) The District Court found that while the jury was being drawn, and prior to her examination, the defendant made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her. (R. 100.) While she does not appear to have advised these women of the reason why she particularly wished to be on the jury, one of them testified that she said "she was simply praying to serve as a juror in that particular case." (R. 13.) She told one of

these women that she had done stenographic work for the Foshay Company for about two weeks after she was married (R. 1[illegible], and in her testimony she admitted that she had worked for the Foshay Company since her marriage but stated that she was employed as a typist for a period of about ten days to do temporary work (R. 65–66). Although the defendant denied that she had told anybody on the jury panel that her employment with the Foshays would probably disqualify her (R. 72), the Government offered in rebuttal a witness who testified that she had also been called on the jury panel and that the defendant had told her that she would like to serve on the jury but "thought probably she would not be accepted" on account of "working for the Foshays." (R. 91.)

Although but a few hours earlier the defendant had talked with three people relative to her employment with the Foshay Company subsequent to her marriage, and had expressed concern to two of them that such employment would probably disqualify her from serving on the jury, she failed to mention the fact that she had worked for the Foshays when the Judge asked her, "Have you yourself ever been in business of any kind?" contenting herself with the answer, "I have been a stenographer before my marriage." The only attempted explanation of this appearing in defendant's testimony, besides the fact that she was extremely nervous when she appeared in court, her previous court experience having been limited to

a traffic court (R. 63), was that her answer was thus limited to employment *before* her marriage "because all the employment that I had had after my marriage lasted only two or three days or a couple of weeks at the most." (R. 77.) However, in response to the next question of the court, "In what kind of business did you work?" she enumerated, among other things, her employment with an automobile concern, a Nash agency, despite the fact, as she admitted in her testimony, that this employment, like the Foshay employment, occurred after her marriage and lasted about the same length of time. (R. 78.) According to the defendant she first thought of the matter of her employment by the Foshay Company the evening of her examination, but decided not to speak to the Judge about it because she did not regard the matter as important. (R. 67.)

Mrs. Clark, the only woman upon the jury, was the twelfth juror to be accepted. (R. 101.) The jury was then sworn and placed in the custody of a United States Marshal, and throughout the trial, which lasted approximately eight weeks, was in the charge of two officers, one a woman and the other a man. (R. 101.) The jury was out for approximately a week after the case was submitted to them, and when discharged stood eleven for conviction and one (Mrs. Clark) for acquittal. (R. 102.)

Coming now to the findings and evidence relating particularly to the defendant's answers to the questions on her *voir dire* examination relating to bias, the District Court found that during the first week

of the trial she made the remark to several of the jurors, on one occasion, that she regarded Mr. Foshay as a victim of circumstances; that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, had come back without a dollar. (R. 101.) When asked by one of the jurors where she had procured that information (which concededly was not based upon any evidence in the case) she said that she had read it in the newspapers, but recalled it only after she was sworn. (R. 22, 28, 30, 32, 101.) In the course of her testimony the defendant admitted that she had made all of these statements, except the one that Foshay was a victim of circumstances; that they were not based on any evidence in the case; and that the only foundation for them was "common talk." (R. 78, 89–90.) She said that she did not remember making the statement that Foshay was a victim of circumstances. (R. 90.)

Also, according to several of the jurors, she at one time prior to the submission of the case, expressed dissatisfaction with the Government because of the way the soldiers were treated after the war. (R. 26, 31.) This was denied by the defendant. (R. 90.)

After the case had been submitted to the jury and during its deliberations, the defendant announced that since the prosecuting attorney, whom she regarded as a very brilliant lawyer, had been unable to convince her of the guilt of the defend-

ants in the case under trial, the other jurors could hardly be expected to do so. (R. 24, 101.)

One of the jurors testified that during an argument in the jury room he called the defendant's attention to the so-called $18,000,000 loan arrangement and asked the defendant whether, if the court should call the jury in for the purpose of asking "why we had not been able to agree," she wished him to tell the Judge that "she believes that Mr. Foshay was a victim of circumstances" and also about the loan arrangement, and she said, "No, I hope you will have more sense than that." (R. 24.)

One of the witnesses for the Government was a man named Coble, an accountant, and while the jury were looking over some charts prepared by him the defendant, according to several of the jurors, said she "would like to choke" Coble; that "he, on some trial in the south, on his testimony, had very nearly convicted a man but the jury had found him innocent, and that his wife's hair had turned gray, and she later died; that his son contracted t. b. and was dying, and when his son died he was going to kill Coble." (R. 25, 27, 31–32.) These statements about Coble, the court found, were obviously based upon information given to the defendant after the trial commenced by her husband, who, apparently without authority from the trial Judge (R. 40), was permitted by some one to visit her about once a week during the trial and converse with her, supposedly in the hearing of the woman bailiff. This information con-

veyed by him to his wife he had received from a Miss Todd, who was connected with the firm to which the defendant's husband belonged, and who had expressed her opinion about Coble to Mr. Clark upon seeing Coble's picture in the newspaper during the Foshay trial. Miss Todd had recognized him from this picture as being the accountant who had testified in a fraud case in Kansas City in which she at one time had been interested. (R. 37–38, 101–102.)

In explanation of her statements about Coble, defendant testified that she did not know of any particular previous case in which Coble had testified, but said that years ago she had "heard of a case where a witness had testified and made a case appear black, and that I was wondering whether the two witnesses were not the same. It was merely a case of thinking out loud, that is all—that I wondered if the two witnesses had not been the same"; that she merely spoke of the matter "in the heat of battle, for the sake of argument, that's all." (R. 80.)

The defendant stated in the jury room that she could not vote to send the seven Foshay defendants to the penitentiary "because it would bother her the rest of her life, if she lived to be a hundred years old," and also expressed the wish that she might consult with her husband and secure his advice as to "how he would vote." (R. 25, 28, 30, 31, 102.)

One of the jurors testified as to defendant's attitude during the deliberations of the jury as follows (R. 25):

> Well, at different times arguments would start, and Mrs. Clark did not seem to be interested—was not listening. Some times she held her hands up over her ears, and it was hard to argue with any one that won't reply. * * * She said that it was getting pretty dry there; she thought she would bring a book, one afternoon, * * *.

Another one testified that "her attitude was very much one-sided all the way." (R. 27.)

After the Foshay jury had been discharged the defendant was visited by a group of Federal investigators, to whom, upon their request, she gave a voluntary statement. (R. 69–70.) This statement did not accord in some respects with her testimony at the trial. For example, she stated to the Federal investigators, in response to one of their questions, that she did not know she was on the Foshay jury until she got in the jury room. (R. 69, 83; *cf.* testimony, pp. 9–11, *supra.*) Her explanation of the variance between this answer and her subsequent testimony was that she was trying to "shield" some one in the office of the District Court Clerk. (R. 69.)

There is little, if any, evidence in the record as to what motivated the defendant's misleading and false answers to the questions propounded to her by the District Judge. While her husband, when president of a bank in St. Paul, had

had certain difficulties with the State Banking Department, and while he had, some five or six years before the Foshay trial, been indicted for perjury, apparently in a State court (R. 88), there does not appear to be any testimony indicating that either he or she had had any difficulties with the Federal authorities. While her husband, as president of the St. Paul bank, had had certain business transactions with the Foshay Company, the testimony does not indicate that she knew of these transactions or was in fact acquainted with any of the defendants in the Foshay case. (R. 67, 86–87.) The defendant had attended high school and business college (R. 17–18) and had some limited bookkeeping experience (R. 18). Before her marriage she was employed as a stenographer at her husband's bank (R. 75), and she testified that she wrote all the insurance of the bank (R. 65, 76); that she did some work in the real-estate department of the bank; that during rush hours she helped in the teller's cage (R. 65), and that she was given the title of assistant cashier so that she could sign checks and drafts during the absence of the other officers. (R. 65.) After her marriage she continued working at the bank for a short time (R. 65), and later worked as a stenographer or typist for a Nash automobile agency, the Foshay Company, and a public stenographer (R. 65, 77–78).

ARGUMENT

I

It is contended by the defendant that the trial court denied her due process of law by proceeding to trial on the return day of the rule to show cause. She asserts that the rule did not apprise her that a trial would be had on the return day and that a large number of witnesses would then be examined on behalf of the Government, and that an insufficient time elapsed between the service of the rule and the return day to permit her to prepare for trial.

The rule was dated November 4, 1931 (R. 6), and was served upon the defendant the same day (R. 10). It specifically directed the defendant "to appear *in person* and show cause, * * * if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., * * * why she should not be adjudged in contempt of the authority of this Court as prayed in said petition." (Italics ours.) The case came on for hearing on the return day before a court of two judges, neither of whom had sat in the trial of the case out of which the contempt proceeding grew. While the defendant then filed an answer which showed that she comprehended fully what the issues in controversy were (R. 6–10), her counsel requested that the hearing be continued if it should involve anything more than an examination of the defendant personally (R. 10–12). Although the court denied this request and directed the Government to proceed with the examination of

its witnesses (R. 12), it said that if it should appear, after the Government had introduced its evidence, that the defendant "should have further opportunity to meet any evidence presented by the Government in support of this petition, we would be very glad to hear you further on it, and pass upon that question at that time" (R. 12).

Presumably the basis of the court's ruling was that the Government's evidence might not be sufficient to make out a case, so that a continuance at that time might operate merely to delay the disposition of the proceeding. That the defendant was not embarrassed by the denial of a continuance at this stage of the proceeding is evident from the fact that a number of the witnesses called by the Government were subjected to vigorous cross-examination. (R. 13, 20, 29, 32, 38, 43, 45.)

After the Government had rested, counsel for the defendant repeated his request for a continuance (R. 58) and the court ordered that the case stand adjourned until November 19, a period of ten days. It stated in this connection that "we have assured Mr. Ueland [counsel for the defendant] that the Court is particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary for the defense to properly present such additional facts that the Court should

have." (R. 59.) The time allotted was evidently satisfactory to counsel for the defense because no exception was taken to the court's ruling and no further continuance was requested when the court re-convened on November 19, counsel proceeding immediately with the introduction of testimony for the defense. (R. 59.)

The granting of a continuance is ordinarily a matter within the sound discretion of the trial court. Under all the circumstances there was, we submit, no such abuse of discretion in denying a continuance on the return day as would amount to a denial of due process. Cf. *Cooke* v. *United States,* 267 U. S. 517, 537.

II

The second contention urged by the defendant is that she was denied due process because being charged with perjury as contempt she was convicted of withholding information when examined on her *voir dire.*

But the trial court found that the defendant was guilty of contempt, in connection with her examination on the *voir dire,* because she had obstructed the administration of justice in two respects: (1) By deliberately and intentionally concealing her employment by the Foshay Company; (2) by falsely answering questions regarding her freedom from bias and intention to follow the testimony and law in rendering her verdict. These findings were sustained by the Circuit Court of Appeals after a review of the evidence. If supported

by competent and substantial evidence, they are of course conclusive. *Bessette* v. *W. B. Conkey Company,* 194 U. S. 324, 338; cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441. As the defendant's contention applies to only one of the grounds upon which she was convicted, it is evident that her conviction must stand regardless of the merits of such contention.

The basis for petitioner's contention that she was being charged with one contempt and convicted of another arises from the fact that the petition for the rule to show cause characterized her answers with respect to the questions asked her concerning her employment as "wilful and corrupt perjury" (R. 5), whereas the conviction in the trial court upon this charge rested upon that court's finding that she had "deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court" (R. 105), which both courts below assumed did not amount to perjury as defined in the statute covering that offense. (R. 106, 128.)

The difficulty with this argument is that it confuses the gist of the offense with which the defendant was charged. She was not indicted for perjury, but was charged with criminal contempt, and, as was succinctly stated by the court below (R. 128), "the gist of criminal contempt is the obstruction of the administration of justice. The gist of perjury is falsification under oath." (R. 128.) While perjury may amount to contempt, if the ob-

structive element is present (*Ex parte Hudgings,* 249 U. S. 378), the point at issue is not whether perjury has technically been committed but whether the tendency of the testimony is to obstruct the performance by the court of its judicial duty. If the testimony has that tendency, obviously it constitutes a criminal contempt, even though all the elements of perjury may not be present. See *People ex rel. Nunns* v. *County Court,* 188 App. Div. (N. Y.), 424, 442; *Young* v. *State,* 198 Ind. 629, 632. That the pleader may call it perjury does not alter the essential nature of the charge, and his characterization may clearly be disregarded as immaterial.

Looking at the petition for the rule to show cause in the light of these principles, we submit that it adequately informed the defendant that she was charged with having concealed her employment with the Foshay Company from the court. It specifically pointed out that in determining the defendant's qualifications as a juror it became material to ascertain whether she had "ever been employed in any business, and if so, when." (R. 2.) It then proceeded, inartistically, but, we think adequately, to call attention to the defendant's answers in respect to the matter of employment. (R. 3.) It followed this by the allegation that—

> it was not and is not true and at the time of so swearing and deposing the said Genevieve A. Clark did not believe it to be true that she, the said Genevieve A. Clark, had

> been in business but that was before she was married and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency, and that it was true that since her said marriage she was employed by the said Citizens State Bank of St. Paul, and other concerns, and as late as July, 1929, was employed by the said *W. B. Foshay Company,* a corporation. (Italics ours.)

And it concluded with the prayer that the defendant be required to appear and show cause why she should not be held in contempt "in consequence of her said contemptuous and obstructive conduct."

That the defendant knew that she was being called to account for failing to disclose her employment by the Foshay Company is evident from her answer, in which she points out the specific questions and answers relating to the matter of employment and endeavors to justify her failure to disclose her employment by the Foshay Company. (R. 8–9.) Likewise, much of her testimony upon direct examination is devoted to the same purpose. (R. 65–67.) The defendant did not ask for a bill of particulars and the record does not disclose that she was in any way embarrassed in making her defense. It is well settled that a proceeding to punish contempt is not in all of its characteristics a criminal prosecution and therefore the technical accuracy of an indictment is not required in charging a contempt. Due process is not denied if the de-

fendant is fairly apprised of the nature of the contempt with which he is charged. In determining this it has been held that the entire record may be examined. See *Blackmer* v. *United States,* 284 U. S. 421, 440; 49 F. (2d) 523, 529 (App. D. C.); *Sinclair* v. *United States,* 279 U. S. 749; *Cooke* v. *United States,* 267 U. S. 517, 537; *Ex parte Grossman,* 267 U. S. 87, 117; *Myers* v. *United States,* 264 U. S. 95, 103; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, *supra; McGovern* v. *United States* (C. C. A. 2d), decided August 30, 1932, not yet reported, certiorari denied Oct. 24, 1932, No. 392; *Conley* v. *United States,* 59 F. (2d) 929 (C. C. A. 8th); *Kubik* v. *United States,* 57 F. (2d) 477 (C. C. A. 8th); *Lang* v. *United States,* 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523; *Armstrong* v. *United States,* 18 F. (2d) 371, 372 (C. C. A. 7th), certiorari denied, 275 U. S. 534; *Schwartz* v. *United States,* 217 Fed. 866 (C. C. A. 4th).

III

Several of the points urged by the defendant relate to the question whether the testimony upon her *voir dire* examination which formed the basis of her conviction constituted criminal contempt.

She first contends that she was not guilty of contempt in connection with her failure to disclose her employment with the Foshay Company because she was not required to volunteer such information, her

oath merely requiring her to make true answers "to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial." (R. 2.) But, as the trial court pointed out (R. 105–106):

> It is true that the question asked her as to her employment did not specifically call for that information, but her deceiving answers to the Court's question disarmed the Court. She purposely implied in her answers to the Court's questions that her employment as a stenographer was limited to the period prior to her marriage. It is significant that she mentioned her employment with the Nash agency, which employment was after her marriage and continued for a period of but a few days, but purposely withheld from the Court her employment after her marriage with the Foshay Company. It is our opinion that the Court's question to Mrs. Clark at the time she was examined as a prospective juror fairly required her to disclose her employment with the Foshay Company, and she was given a full opportunity to do so. Her failure to make the disclosure and her cunningly framed answers constituted an intentional concealment of a material matter.

The court below also treated this concealment as contemptuous. (R. 107.)

The record discloses that the defendant is a woman of intelligence and business experience. That she realized the important bearing which her

employment by the Foshay Company had upon her qualifications as a juror is evident from the conversations which she had with other prospective jurors shortly before she was sworn. See p. 10, *supra*. It is also significant that on the night of her examination she was, according to her testimony, sufficiently disturbed by her concealment of such employment as to give serious consideration to the question whether she should report the matter to the judge on the following day. (R. 67.) If the defendant had desired to be candid she would not have relied on the mere form of the questions put to her by the trial judge as justifying her failure to disclose facts which she had previously considered as a possible basis for her disqualification. The questions put to her were sufficiently provocative to have elicited from a person who had nothing to conceal information which one of defendant's intelligence would recognize as material.

The defendant also contends that however obstructive to the administration of justice the testimony in question may have been, it did not constitute criminal contempt because it did not in any way interfere with "order and decorum in the court room." Of course, anything that disturbs order and decorum in the court room is contempt, but that is because of its obstructive character. Both courts below considered defendant's concealment of material facts as sufficiently obstructive of justice to constitute contempt. We have found no case, and the defendant cites none, which may be

construed as holding that conduct like defendant's, although involving no physical affront to the dignity of the court, may not constitute a criminal contempt. As was said in the *Hudgings case, supra,* p. 383, "an obstruction to the performance of judicial duty resulting from an act done in the presence of the court is * * * the characteristic upon which the power to punish for contempt must rest." See also *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402.

The defendant further contends that it was not proved beyond a reasonable doubt that she answered falsely the questions put to her in respect of her freedom from bias. But the trial court recognized that the onus was upon the Government to establish its charges beyond a reasonable doubt (R. 103), and it specifically found, after reviewing the evidence bearing upon the question of bias, that there was no reasonable doubt that the defendant's answers in regard thereto were false and untrue. (R. 107.) That there was substantial and competent evidence to support this finding is apparent from the evidence reviewed at pp. 9–17, *supra.* The finding is therefore binding in an appellate court. See *Bessette* v. *W. B. Conkey Co., supra;* cf. *Gompers* v. *Bucks Stove & Range Co., supra.*

The defendant relies upon the rule in perjury cases, announced in *Hammer* v. *United States,* 271 U. S. 620, 626, that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused," and asserts that in

the instant case her contention was based wholly upon circumstantial evidence. But, as we have heretofore pointed out (p. 21, *supra*), this is a prosecution for criminal contempt and not for perjury. The rule to which the defendant refers consequently does not apply.

IV

It is next contended by the defendant that the trial court erred in receiving in evidence the testimony of the defendant's fellow jurors concerning her actions and utterances in the jury room after the case had been submitted to them. This testimony had a bearing upon the state of mind of the defendant when she was interrogated upon the *voir dire* as to her freedom from bias.

After an exhaustive review of the authorities (R. 137–142), including those cited by the defendant in her petition for certiorari, the court below reached the conclusion that the testimony in question was admissible, saying (R. 141):

> The special divinity which surrounds the deliberations of a jury is only so far as the protection of the verdict is concerned. If one juror should bribe the balance of the jury to return a verdict would any court assert that there was no power to show this by the statements of another juror as to what the briber had said. If a juror should present to the jury affidavits of alleged facts which should properly have been a matter

> of testimony is a court powerless to rectify the wrong which might thus be perpetrated? Must a court sit supinely and spinelessly and permit such misconduct in a juror because of the fine distinction to be drawn that while a court may receive such evidence to show misconduct of a juror in acts, it has no power to do so as to utterances when the acts can only be shown by the utterances. It would carry the doctrine of privilege to absurd results to so hold.

The court then refers to the decision of this Court in *McDonald* v. *Pless,* 238 U. S. 264, where it was held that the testimony of a juror may not be received to prove the misconduct of himself or his colleagues in reaching a verdict, but in which this Court said (p. 269):

> The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

The court said that this excerpt was "significant and fits the situation in this case," because (R. 142):

> There is no question here of impeaching the verdict of a jury. The question is the misconduct of one chosen as a juror. It would seem that if misconduct of a juror in

> a jury room could be shown by the testimony of other jurors for the purpose of punishing such misconduct that it could be shown for the purpose of its probative force, and that is the situation here. The testimony admitted of other jurors as to the statements and conduct of appellant in the jury room were admissible as bearing on the question of the falsity of answers given by her on the *voir dire* examination. No public policy requires the proceedings in the jury room to be kept secret under the circumstances here presented.

We deem it unnecessary to attempt to add anything to what the court below has said on the question of the admissibility of this testimony, because the court below correctly held that there was sufficient evidence without it to justify the finding of the trial court that the defendant was guilty of criminal contempt in falsely answering the question as to her freedom from bias. Indeed, the opinion of the trial court discloses that it gave little, if any, consideration to what the defendant said or did after the jury had retired for its deliberations. That court said in this connection (R. 106–107):

> * * * it is our opinion that Mrs. Clark purposely withheld information from the Court so as to be accepted as a juror. Her remarks to her fellow prospective jurors as to her desire to be accepted on the panel and that she had a special purpose in mind, may without any other circumstances, be quite consistent with an honest rather than a

wicked intent. Her studied attempt, however, to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror. In light of all the circumstances as developed by the evidence, it is inconceivable that a woman with an honest intention at the outset would endeavor to influence her fellow jurors during the first week of their service with a statement regarding Mr. Foshay being a victim of circumstances. There was an utter absence of any testimony that would prompt such a statement, and while it may be a fact that she was improperly influenced after the trial commenced, she herself contends that no one communicated any information to her regarding the facts, or that any outsider endeavored to influence her after she was accepted as a juror. If her story is true regarding the absence of any outside influence, there can be no serious question but that her mind was not free and open when she was accepted as a juror, and her answers to the Court in regard thereto were false and untrue. Such false answers obstructed the Court in the performance of its duty and constituted contempt.

In addition to the testimony referred to by the trial court, the record shows that several of the jurors testified that on one occasion before they retired the defendant stated that she did not have

any use for the Government because they had not treated the soldiers right when they came back from the war. (R. 26, 31.) It is evident, therefore, that there was substantial evidence outside of that which related to the defendant's utterances and actions during the deliberations of the jury to warrant the finding of the trial court that she was not free from bias when she was examined on her *voir dire*.

Even if, as the defendant contends, the testimony relating to her actions and utterances in the jury room should not have been admitted, it does not follow that her conviction must be reversed, there being sufficient other evidence to support the conviction. As was said in *Sinclair* v. *United States*, 279 U. S. 749, 767, *supra:*

> Objections are offered to the admission of certain evidence. In answer, we need only refer to what was said in *The United States* v. *King*, 7 How. 833, 854, 855: "In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record."

CONCLUSION

The defendant was accorded a fair trial. The evidence of her guilt is clear and has been held sufficient in two Courts. No questions of law deserving of review in this Court are presented. Only the finding of facts and the application of settled principles of law to the facts found are involved. The petition should accordingly be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 531

GENEVIEVE A. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 99–108) is reported in 1 F. Supp. 747. The majority (R. 121–145) and the dissenting (R. 145–164) opinions of the Circuit Court of Appeals are reported in 61 F. (2d) 695.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1932. (R. 164.) The petition for certiorari was filed November 28, 1932, and granted January 9, 1933. (R. 167.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court denied petitioner due process by proceeding to trial on the return day of the rule to show cause why she should not be adjudged in contempt.

2. Whether petitioner was convicted of a contempt with which she was not charged, and, if so, whether the judgment of conviction must be reversed.

3. Whether petitioner's concealment of her employment by the Foshay Company constituted contempt.

4. Whether petitioner's other conduct constituted criminal contempt.

5. Whether the evidence showed beyond a reasonable doubt that petitioner answered falsely the questions asked her in her examination on the *voir dire* in respect of her freedom from bias.

6. Whether the rule as to the quality of proof in perjury cases is applicable.

7. Whether the testimony of petitioner's fellow jurors concerning her utterances and actions during their deliberations after the case had been submitted to them was erroneously admitted in evidence.

8. Whether the contempt was purged by petitioner's sworn answer and testimony.

STATUTE INVOLVED

Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385) provides:

> The said courts [courts of the United States] shall have power to impose and adminster all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On November 4, 1931, the Government filed in the United States District Court for the District of Minnesota a petition for a rule to show cause why the petitioner herein (hereinafter sometimes called the defendant) should not be punished for criminal contempt. This petition alleged that on September 1, 1931, there came on for trial in that court an indictment which had been returned against one Wilbur B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud. (R. 1–2.) The defendant in the instant proceeding was one of the jury panel summoned in connection with that trial. (R. 2.) When called for examination on her *voir dire* she took the oath

that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on such trial.[1] (R. 2.) A number of questions were then asked her by the District Judge who presided at the trial. (R. 3.) These questions and the defendant's answers are set forth verbatim at R. 16–18 and also in the dissenting opinion at R. 146–147. The petition then enumerated five of the topics of inquiry which had a material bearing upon the defendant's qualifications and competency to sit as a juror (R. 2–3), and gave a detailed summary of defendant's answers upon these subjects (R. 3). It alleged that these answers were knowingly false in certain particulars (R. 3–4), and that the due administration of justice, in the selection of a jury, and in the trial of said criminal case was in fact thereby corruptly and unlawfully impeded. (R. 5.) The petition concluded with the prayer that the defendant be required—

> to appear in this Court in person at a day certain and show cause why she should not be held in contempt * * * in consequence of her said contemptuous and obstructive conduct, and punished by fine or imprisonment as for criminal contempt. (R. 5.)

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[1] The exact language of the oath was stated in the dissenting opinion to be: "You do solemnly swear that you will true answers make to such questions as may be put to you touching upon your qualifications and competency to sit as a juror in this case." (R. 146.)

A rule to show cause was issued in response to this petition. (R. 6.) The rule was dated the same day that the petition was filed, and directed the defendant to—

> appear in person and show cause, before this Court, if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, why she should not be adjudged in contempt of the authority of this Court as prayed in said petition.

It also directed that a certified copy of the petition and of the rule be served upon the defendant on or before November 6, 1931. The rule was served on the day it was issued, November 4, 1931 [2] (R. 10), and, together with the Marshal's return showing that he had served the writ, was filed in the District Court on November 6, 1931 (R. 6).

In response to the rule to show cause the defendant on November 9, 1931, filed an answer (R. 6–10), which, among other things, denied that any answer or answers made by her upon her *voir dire* examination impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the Foshay trial (R. 9).

The proceeding came on for hearing on November 9, 1931, before a court composed of two Dis-

[2] At the hearing on November 9, 1931, counsel for the petitioner stated that the "rule to show cause was served on my client last Wednesday." The rule was thus served on November 4, 1931, the date it issued.

trict Judges (District Judge Nordbye and District Judge, afterward Circuit Judge, Sanborn, neither of whom had presided at the Foshay trial). While counsel for the defendant was willing to proceed with the hearing if it involved merely the examination of the defendant, he objected to an immediate general trial of the issues in controversy on the ground that he had not had sufficient opportunity to prepare for such a trial, as the time which had elapsed since the return of the rule to show cause and his retention in the case had been devoted to the preparation of the defendant's answer. The court ruled, however, that the Government should proceed with the introduction of its evidence. It said that it did not think that a continuance at that time would avail the defendant much, but stated that if it should appear that the defendant needed further time when the Government had concluded its evidence, the matter of continuance would then be given consideration. To this ruling defendant noted an exception. (R. 12.)

The Government then presented its evidence. Many of the Government's witnesses were subjected to vigorous cross-examination by the defendant's counsel. (R. 13–58.) At the conclusion of the cross-examination of the Government's witnesses, petitioner's counsel did not ask that any of the Government's witnesses be later recalled for further cross-examination. The Government's testimony apparently consumed the morning of

November 9th, because after the Government had rested the defendant's counsel stated (R. 58):

> I repeat what I said this morning. I have not had adequate time to prepare this case, and I would like time to present the respondent's case.

In response to this request the court continued the matter until November 19th, a period of ten days. No objection was made on defendant's behalf to this action and no request for further time was then made. In passing upon the request for a continuance, the court said that it was—

> particularly interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary to the defense to properly present such additional facts that the Court should have. (R. 59.)

Pursuant to the court's order the matter again came on for hearing on November 19th. No request for a further continuance was made on behalf of defendant, and her counsel proceeded with the introduction of evidence for the defense. (R. 59–90.) The defendant took the stand in her own behalf and was given full opportunity to explain the charges against her. (R. 62–90.) After the defendant had rested the Government introduced the testimony of several witnesses in rebuttal. (R. 90–96.)

Certain motions were then interposed by the defendant and taken under advisement. Following this the arguments of counsel commenced. These arguments consumed the remainder of November 19th and a portion, at least, of November 20th. (R. 96–97.) On December 26, 1931, the court filed its findings of fact and conclusions of law. (R. 99–108.) It held that contempt had been established (R. 105–107) and, on the same day, sentenced the defendant to imprisonment in the county jail for a period of six months and to pay a fine of $1,000 (R. 98). It stayed execution of the sentence, however, for a period of 42 days to permit counsel for the defendant to be heard on the question of modification or suspension of sentence, in the event he so desired. Counsel for the defendant acquiesced in this arrangement. (R. 97–98.) The record does not show that any further evidence was introduced.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment convicting the defendant of contempt was affirmed, but the sentence was set aside and the case remanded for re-sentencing on the ground that Section 268 of the Judicial Code (*supra*, p. 3) made provision for fine *or* imprisonment only. (R. 121–145, 165.) One judge dissented. (R. 145–164.)

Although the petition upon which the rule to show cause issued referred to a number of questions and answers made by defendant on her *voir dire* examination, the findings of the trial court related

only to the defendant's answers to questions dealing with two subjects bearing upon her qualifications as a juror.

1. The District Court found that the defendant had obstructed the administration of justice when examined on her *voir dire,* by "deliberately and intentionally" concealing the fact that she had been employed during the summer of 1929 by the W. B. Foshay Company, a corporation with which the defendants in the criminal case had been connected. (R. 105–106.) The questions and answers on the *voir dire* examination of the defendant relating to this matter were as follows (R. 17):

> Q. Have you yourself ever been in any business of any kind?
>
> A. I have been a stenographer before my marriage; yes.
>
> Q. In what kind of business did you work?
>
> A. Well, I did some banking and some real estate and insurance, and I was with an automobile concern, with a Nash agency.

2. The District Court also found that the defendant had obstructed the administration of justice by stating falsely on her *voir dire* examination that she was free from bias and that her verdict would be based only upon the evidence as introduced and the law as given by the court. The pertinent questions and answers on her *voir dire* examination with reference to this subject were as follows (R. 18):

> Q. Well, do you feel that you are now—that your mind is now open and free, and

that you are not biased either one way or the other?

A. Yes; I do feel that way.

* * * * *

Q. And you think, in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes; I do.

The District Court found that the following facts were established by the evidence and the admissions of the parties (R. 99–102):

The defendant was at all the times here material a resident of Minneapolis, Minnesota, and the wife of D. D. Clark. On August 24, 1931, she received a summons to report as a juror on September 1, 1931, at the Federal Building at Minneapolis. The jurors, who were summoned to report on that day, were all called in connection with the trial of *United States* v. *Foshay et al.* (R. 99.) At the time the defendant received her summons she desired to be excused from service during the week of September 1st. She did not then know for what case she was called. Shortly thereafter she telephoned her sister, a Mrs. Brown, at the Federal Building in St. Paul and made inquiry as to how she, the defendant, could be excused or her term of service as a juror postponed. Mrs. Brown went to see the Chief Deputy Clerk of the District Court at St. Paul and then called the defendant, advising her that if she wished to be excused she must see

the judge when she reported on September 1st. Mrs. Brown further informed the defendant that the trial for which she was summoned was the Foshay trial and that she would probably not be accepted since she had been employed by the Foshay Company, which was one of the companies with which the defendants in the criminal case had been connected. (R. 99.)

On the morning of September 1st the defendant, in company with her husband, reported at the court room in the Federal Building in Minneapolis where the case was to be tried. (R. 100.) The other members of the panel were assembled in that room. The District Judge examined the jurors as to their qualifications. While the jury was being drawn and before she was called for examination, the defendant made the statement to several other women on the panel that she wished to serve on the jury, that she had a special reason for wanting to be on the jury, and that she was afraid her former employment by the Foshay Company would disqualify her; that she had worked for the Foshay Company as a stenographer or typist for about two weeks in the summer of 1929, but did not know or come in contact with any of the defendants personally. (R. 100.)

The defendant's husband for a number of years prior to September 1, 1925, was president and in charge of the Citizens State Bank of St. Paul. Prior to the defendant's marriage to him in 1922

she had also worked in the bank as a clerk and stenographer and had had the title of assistant cashier. One of the defendants had been a depositor and borrower of the bank while the defendant was working there, and he was well acquainted with the defendant. (R. 100.) The defendant's husband knew Foshay and had done business with him and his company. (R. 100.)

Following the examination by the District Judge as to her qualifications,[3] the defendant was accepted as a juror. (R. 100–101.) She was the only woman upon the jury and the twelfth juror to be accepted. The jury was then sworn and placed in the custody of the United States Marshal, and throughout the trial, which lasted approximately eight weeks, was in the charge of two officers, one a man and the other a woman. During the first week of the trial the defendant made the remark to several of the jurors, on one occasion, that she regarded Mr. Foshay as a victim of circumstances; that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, he had come back without a dollar. (R. 101.) When asked by one of the jurors where she procured that information, which was concededly not based upon any evidence in the case, she said it

[3] No further reference is made at this point to the finding of the District Court as to the questions asked by the District Judge and the answers given by the defendant on the *voir dire* examination, because the pertinent questions and answers have been set forth verbatim at p. 9–10, *supra*.

was from a newspaper which she had read before the trial and had forgotten about. (R. 101.) At a later period, she expressed to other jurors dissatisfaction with the Government because of the way the soldiers were treated after the war. (R. 101.)

During the deliberations of the jury, after the case was finally submitted, she announced that, since the prosecuting attorney had been unable to convince her of the guilt of the accused, the other jurors could hardly be expected to do so. She virtually closed her ears to the arguments of other jurors and with respect to the Government witness Cobel made a statement the effect of which was to charge him with having given perjured testimony in a case in the South in an attempt to convict an innocent man. (R. 101.) This statement was obviously based upon information given to her after the trial commenced by her husband, who was permitted to visit her about once a week during the trial and converse with her, supposedly in the hearing of the woman bailiff. (R. 101.) This information conveyed by him to his wife he had received from a Miss Todd, who was connected with his firm and who had expressed her opinion about Cobel upon seeing Cobel's picture in a newspaper during the Foshay trial. Miss Todd had recognized him from this picture as being the accountant who had testified in a fraud case in Kansas City in which she had at one time been interested. (R. 102.)

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The defendant, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. (R. 102.) She also made statements to the effect that she could not vote to send seven men to the penitentiary. (R. 102.) The deliberations of the jury continued for approximately one week, and resulted in a disagreement, eleven voting for conviction and one (the defendant) for acquittal. (R. 102.)

SUMMARY OF ARGUMENT

I

The defendant was not denied due process when the court proceeded to trial on the return day of the rule to show cause. The rule sufficiently apprised her of the fact that the trial would proceed upon the return day. Examination of the record shows that she was not in any way prejudiced by trial on that date. A sufficient adjournment to enable her to prepare and make her defense was granted and her counsel conducted as full an examination of the Government's witnesses as he deemed advisable.

II

The defendant was not convicted of a crime with which she was not charged. The petition upon which the rule to show cause issued clearly advised the petitioner that she was charged with a contempt by reason of her conduct upon her *voir dire*

examination, which resulted in an obstruction of justice. Characterization of her conduct as perjury is immaterial, and the record shows that she was in no way misled as to the charge against her.

The contempt charged was a single contempt arising out of her conduct in answering various questions on her *voir dire* examination. Even if for any reason her conduct in answering questions dealing with her employment is disregarded, her false answers to the questions relating to her bias sustain her conviction for contempt. Since only one contempt was committed, there is no reason for an application of the rule applied where separate acts of contempt are charged and conviction of one act is set aside. In the present case there is no reason to suppose that the sentence of the District Court was based in part upon each false or misleading answer made by the defendant.

III, IV

The defendant's concealment of her previous employment with the Foshay Company and her conduct upon her examination on the *voir dire* constituted contempt, although it did not immediately interfere with the order and decorum of the courtroom. Physical affront to the court is not a necessary element of criminal contempt. Defendant's conduct clearly obstructed the court in the performance of its judicial functions, since it made the trial of the defendants in the case upon which

this defendant sat as a juror, a futility. Under the authorities, defendant's conduct clearly constituted contempt.

V

Since the evidentiary facts found by the District Court had a reasonable tendency to sustain the general conclusions of fact made by that court, they should not be disturbed. The findings are supported by substantial evidence, and, in many instances, constitute verbatim statements of the testimony. An examination of the record shows that the conviction of the defendant was clearly justified.

VI

As the gist of the offense with which the defendant was charged was deliberate obstruction of the administration of justice and not perjury, the rule as to the quality of proof in perjury cases is inapplicable.

VII

The testimony of defendant's fellow jurors concerning her actions and utterances in the jury room, introduced for the purpose of showing the wilful purpose of the defendant in testifying on her *voir dire* examination that she was free from bias or prejudice, was competent. This evidence was not introduced for the purpose of impeaching a verdict or showing misconduct in the jury room, and the rules applicable to testimony used for such pur-

poses are not applicable to the testimony here. In any event there is not merit in the point, since the court below correctly held that there was sufficient other evidence to sustain defendant's conviction.

VIII

The contention that the defendant's denials by answer and testimony amounted to compurgation of the contempt is not properly before this Court. Even if it is, the rule, which is of medieval origin, has no proper place in the Federal judicial system, and there is no remnant of the ancient rule which should be regarded as surviving the previous decisions of this Court.

ARGUMENT

I

THE TRIAL COURT DID NOT DENY THE DEFENDANT DUE PROCESS BY PROCEEDING TO TRIAL ON THE RETURN DAY OF THE RULE TO SHOW CAUSE

It was said in both the majority and dissenting opinions below (R. 125, 148) that the criminal contempt here involved, although committed within the presence of the trial court, was one which, because of its character, could not have been known to the court as the result of its judicial knowledge or observation, and that it was thus a "constructive" rather than a "direct" contempt. In a proceeding to punish such a contempt, due process requires, according to the decision of this Court in *Cooke* v. *United States,* 267 U. S. 517, 537, "that the accused should be advised of the charges and

have a reasonable opportunity to meet them by way of defense or explanation." This includes, as this Court said in the *Cooke case*—

> the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

In the instant case defendant contends that by proceeding to trial on the return day of the rule to show cause the trial court did not give her a reasonable opportunity to make her defense, and thereby deprived her of due process, because the rule did not apprise her that a trial would be had on the return day and that a large number of witnesses summoned on behalf of the Government would then be examined, and because an insufficient time elapsed between the service of the rule and the return day to permit her to prepare for trial. (Br.[4] p. 14.)

The rule to show cause was dated November 4, 1931 (R. 6) and was served the same day (R. 10).[5] That it fairly apprised the defendant that she would be required to stand trial upon the return day is,

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[4] The brief in support of the petition for certiorari will hereafter be designated as "Br." The supplemental brief filed after certiorari was granted will be designated as "S. Br."

[5] See footnote 2, p. 5, *supra*. It appears that on November 3d the defendant was interrogated privately about her conduct on the jury (R. 18, 68–71, 74) so that even before the rule to show cause was served she knew that her conduct was being scrutinized.

we think, evident. With the rule there was served, as directed by the rule, a copy of the petition stating the charges. After reciting the filing of the Government's petition the rule specifically directed the defendant to—

> appear *in person* and show cause, * * * if any she has, on the 9th day of November, A. D. 1931, at 10 o'clock A. M., * * * why she should not be adjudged in contempt of the authority of this Court as prayed in said petition. (R. 6.) (Italics ours.)

That she should show cause *in person* is inconsistent with the idea that she was being called upon simply to submit her response to the petition on the return day. In fact, under the terms of the rule, she could have stated her defense orally. The exact form of the procedure followed is not important. So long as oppression or unfairness does not result, the matter is one for judicial regulation. *Cooke* v. *United States, supra; In re Savin, Petitioner,* 131 U. S. 267. It also seems clear that the procedure adopted did not contemplate merely a formal arraignment of the defendant on the return day, as in a criminal case. One of the purposes of such arraignment is the formal advisement of the defendant of the charges against him. That had already been done in the instant case. If then, as we submit, the rule to show cause was a summons to trial it necessarily constituted notice to defendant to be prepared to meet the evidence for the Government.

The question which then arises is whether the defendant was embarrassed or prejudiced in making her defense because she was required to proceed to trial on the return day of the rule to show cause.

The record discloses that the rule to show cause came on for hearing before a court of two judges, neither of whom had sat in the trial of the criminal case out of which the contempt proceeding grew. Counsel for the defendant filed an answer to the petition which showed that he fully comprehended the charges made and the issues presented (R. 6–10), but objected to an immediate hearing if it should involve anything more than an examination of the defendant personally. Although both the petition and the answer are short, covering together only ten pages of the printed record, counsel stated that the time which had elapsed between the service of the rule to show cause and the return day had been too short to allow him to do more than frame his answer and that he had had no opportunity to prepare for an extended trial. (R. 10–12.) He accordingly requested that the case be continued for a period of at least thirty days to permit adequate preparation. (R. 12.)

The court denied this request but said that if it should appear, after the Government had introduced its evidence that the defendant—

> should have further opportunity to meet any evidence presented by the Government in support of this petition, we would be very

> glad to hear you further on it, and pass upon that question at that time. (R. 12.)

As the court stated that " It does not seem to us that a continuance now is one that would avail the defendant very much, whether it is thirty days or a week " (R. 12), it obviously concluded that the Government's evidence could be taken without prejudicing the defendant's right to a fair trial of the issues. The defendant noted an exception to the court's ruling (R. 12), and the Government introduced its evidence. That the defendant was not prejudiced by the denial of a continuance at the commencement of the trial is evident from the fact that a number of the witnesses called by the Government were subjected to vigorous cross-examination. (R. 13, 20, 29, 32, 38, 43, 45.)

After the Government had rested, counsel for the defendant repeated his request for a continuance (R. 58), and the court ordered that the case stand adjourned until November 19th, a period of ten days. It stated in this connection that—

> we have assured Mr. Ueland [counsel for the defendant] that the Court is principally interested in getting all the facts, and that if there is any testimony or if there are any witnesses that should be brought before the Court to testify, the Court stands ready to aid the defense in bringing into Court such witnesses as may be necessary for the defense to properly present such additional facts that the Court should have. (R. 59.)

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The time allotted was evidently satisfactory to counsel for the defendant because no exception was taken to the court's ruling and no further continuance was requested when the court reconvened on November 19th. Despite the offer of the court of its process to assist the defendant in bringing before it any witnesses that the defendant might deem necessary to aid in her defense, no request was made by counsel for the defendant, at any time, for the recall of any of the Government's witnesses for further cross-examination and on the adjourned date he proceeded immediately with the introduction of testimony for the defense. Thus after ample opportunity for study and investigation, counsel for the defendant must have concluded that the cross-examination of the Government's witnesses had been entirely adequate and that no further cross-examination was advisable.

The record further discloses that after the introduction of evidence had been concluded the defendant's counsel was given full opportunity to argue the questions of law involved, and after conviction the case was held open for a period of 42 days, under arrangements evidently satisfactory to defendant's counsel, to permit the presentation of any extenuating circumstances which might warrant the modification or suspension of sentence. (R. 96–98.)

That the defendant was given full opportunity to make her defense and that she was not embarrassed because of any lack of opportunity for prep-

aration is evident from the record. The fact that she had but five days' notice of the charges is obviously but one of numerous elements to be considered in determining whether she was accorded due process. In *In re Savin, Petitioner,* 131 U. S. 267, *supra,* only one day ensued between the notice of the charges and the hearing.

Petitioner questions the fairness of putting her to trial immediately following the filing of her answer. She says that in a criminal case triable by jury it is fundamental that the accused may not be put to trial, over his objection, immediately after a plea of guilty. (S. Br. pp. 5–6.) If no notice had been given to the defendant in the instant case that she was to be placed on trial on the return day, there would possibly be merit in her contention even though the procedure in contempt cases is essentially informal. But, as heretofore stated, the rule to show cause clearly advised her to be ready for trial on the return day. In a criminal case the first formal notice which the defendant has of the charges against him is when he is arraigned. This accounts, of course, for the rule in such a case that the defendant should have a reasonable time after arraignment to prepare for his defense. Whether due process has been denied depends, of course, upon the peculiar facts of each case. General principles must be construed in the light of particular circumstances. We believe that the court below properly concluded that the record here does not disclose a denial of due pro-

cess in connection with the present claim of defendant. The dissenting judge below does not discuss the question and thus he apparently concurred in the conclusion of the majority upon it.

The defendant cites *Powell* v. *Alabama,* decided by this Court on November 7, 1932 (Nos. 98–100, present term), but that case involved the question whether the defendants were, in substance, denied the right to counsel. No such question is here presented.

II

THE DEFENDANT WAS NOT CONVICTED OF A CONTEMPT WITH WHICH SHE WAS NOT CHARGED AND HER CONDUCT CONSTITUTED ONE CONTEMPT

The defendant also contends that she was denied due process because, being charged with perjury as contempt, she was convicted of withholding information when examined on her *voir dire.* She asserts that she was charged with two separate contempts: (1) failure to disclose her employment by the Foshay Company and (2) perjury in stating that she felt unbiased and thought she could base her verdict on the evidence and the law as given to her by the trial court. (Br. 16.) The argument that there was a denial of due process seems to be addressed to what she denominates as the first contempt. It is argued that if she could not lawfully be convicted for the first contempt the decisions of this Court in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, and *Toledo Newspaper Co.* v. *United States,* 247 U. S.

402, required the court below to reverse the conviction. We believe that there was no denial of due process as urged and that petitioner was charged with a single contempt resulting in the obstruction of justice which arose by reason of her several answers to question propounded to her by the trial court upon her *voir dire* examination.

The trial court clearly regarded the charge against the petitioner as stating the commission of a single contempt of court (R. 102) and this was the view taken by the court below (R. 144–145). The petition upon which the rule to show cause was based referred to a number of false statements alleged to have been made by the petitioner upon the single occasion, when she was examined on the *voir dire* by the trial judge at the Foshay trial. (R. 3–5.) After detailing the questions and answers of the petitioner and specifying the respects in which the answers were false, the petition concluded (R. 5):

> And the said Genevieve A. Clark, in the manner and form aforesaid, having taken an oath before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and contrary to her said oath, did depose and state material matters which she did not then believe to be true and did then and there commit wilful and corrupt perjury; *and the due administration of justice, in the selection of a jury, and in the trial of said Foshay*

> *case in this Honorable Court was in fact thereby corruptly and unlawfully impeded and obstructed.* (Italics ours.)

The basis for the petitioner's contention that she was convicted of a contempt with which she was not charged seems to be the statement in the petition just quoted that by her answers she committed "wilful and corrupt perjury." Petitioner interprets the petition, therefore, as charging her with contempt based entirely upon the fact that her answers were perjurious. The trial court convicted the petitioner because her answers upon her examination on the *voir dire* were so false or deceptive as to obstruct the court in the performance of its duty and considered that it was immaterial whether her conduct amounted to perjury or not. (R. 102.) Finding that the petitioner "deliberately and intentionally concealed her association with the Foshay Company when she was examined by the Court" (R. 105) and "that her mind was not free and open when she was accepted as a juror, and her answers to the Court in regard thereto were false and untrue" (R. 107), the trial court concluded that she was guilty of contempt because her false answers obstructed the court in the performance of its duty (R. 107). In sustaining her conviction the court below, after a review of the evidence, concluded that the findings of the trial court were supported by substantial and sufficient evidence. (R. 136.) For reasons stated at *infra,* page 41, such findings should be regarded as conclusive.

We believe that the petitioner's contention that she was convicted of a contempt with which she was not charged is based upon a misconception of the charge laid in the petition upon which the rule to show cause was based. Both courts below treated the petition as charging a contempt consisting of an obstruction of justice. We believe that this is the proper interpretation of the charge made against the petitioner. The distinction between such a charge and a charge of perjury was succinctly stated by the court below (R. 128):

> The gist of criminal contempt is the obstruction of the administration of justice. The gist of perjury is falsification under oath.

While perjury may amount to contempt if the obstructive element is present (*Ex parte Hudgings*, 249 U. S. 378), the fundamental inquiry is not whether there has been perjury, but whether the tendency of the defendant's conduct is to obstruct the performance by the court of its judicial functions. If the defendant's conduct has that tendency, it may constitute a criminal contempt even though all of the elements of perjury are not present. See *People ex rel. Nunns* v. *County Court*, 188 App. Div. (N. Y.) 424, 442; *Young* v. *State*, 198 Ind. 629, 632, and cases cited, *infra*, pp. 35–38. The fact that the charge describes the conduct as perjury does not alter its essential nature, and this characterization ought to be disregarded if the defendant was sufficiently warned

that the charge which she would have to face was not perjury but the contemptuous obstruction of justice.

We believe that an examination of the petition for the rule to show cause, in the light of these principles, shows that it sufficiently informed the defendant that she was charged with a criminal contempt resulting in the obstruction of justice because of her false answers upon the *voir dire* examination, among which were her concealment of her employment by the Foshay Company and her false answers to the questions designed to establish whether she was biased. The petition specifically pointed out the materiality of determining whether the petitioner had ever been employed in any business, and if so, when. (R. 2.) It then proceeded, somewhat inartistically, but, we believe, adequately, to identify the specific portions of the petitioner's *voir dire* examination involved in the charge of criminal contempt.

That the defendant knew that she was being called to account for failing to disclose her employment by the Foshay Company is evident from her answer, in which she points out the specific questions and answers relating to the matter of employment and endeavors to justify her failure to disclose her employment by the Foshay Company. (R. 8–9.) Likewise, much of her testimony upon direct examination was directed to the same end. (R. 65–67.) Similarly, her answer

shows that she was aware that one of the questions with respect to which she would be examined involved her answers upon questions as to her bias (R. 9) and her direct testimony at the hearing shows that she was cognizant of the fact that this was a material portion of the charge of criminal contempt. (R. 67.) Furthermore she denied that any answer or answers made by her impeded or obstructed the due administration of justice in the selection of the jury, or otherwise, in the trial of the Foshay case. (R. 9.) Thus the defendant was aware of the gravamen of the offense charged and met it squarely in her denials. It does not appear that the defendant asked for a bill of particulars, and we believe that there is no basis in the record for her contention that the insertion in the petition of the characterization of her answers as perjury (R. 5) in any way misled her or induced her to limit her defense to an attempt to meet a charge of perjury alone.

The question whether petitioner was convicted of a contempt with which she was not charged was carefully considered by the court below. That court concluded, correctly we believe, that the petitioner was sufficiently advised of the charges against her. (R. 125–129.) The dissenting judge in the court below took a different view. (R. 148–152.) It is well settled that a proceeding to punish contempt is not in all of its characteristics a criminal prosecution, and the technical rules of plead-

ing in an indictment do not obtain. Due process is not denied if the defendant is fairly apprised of the nature of the contempt with which he is charged. In determining this, it has been held that the entire record may be examined. See *Blackmer* v. *United States,* 284 U. S. 421, 440; 49 F. (2d) 523, 529 (App. D. C.); *Sinclair* v. *United States,* 279 U. S. 749; *Cooke* v. *United States,* 267 U. S. 51, 537 *supra; Ex parte Grossman,* 267 U. S. 87, 117; *Myers* v. *United States,* 264 U. S. 95, 103; *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, *supra; McGovern* v. *United States* (C. C. A. 2d), decided August 30, 1932, not yet reported, certiorari denied October 24, 1932, No. 392; *Conley* v. *United States,* 59 F. (2d) 929 (C. C. A. 8th); *Kubik* v. *United States,* 57 F. (2d) 477 (C. C. A. 8th); *Lang* v. *United States,* 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523; *Armstrong* v. *United States,* 18 F. (2d) 371, 372 (C. C. A. 7th), certiorari denied, 275 U. S. 534; *Schwartz* v. *United States,* 217 Fed. 866 (C. C. A. 4th). Accordingly, we believe that there is no basis for the petitioner's contention that she was convicted of a contempt with which she was not charged.

We understand that petitioner directs her argument upon this question entirely to the charge in the petition dealing with questions and answers relating to her previous employment. Even if it be assumed (contrary to our view of the fact) that the petition did not sufficiently charge that in answer

to those questions she had wilfully and falsely concealed the fact that she had been employed by the Foshay Company, there would be no reason to disturb the judgment of the court below. The trial court found that the petitioner's answers to the questions relating to her bias were false and that such false answers obstructed the court in the performance of its duty and constituted contempt. (R. 107.) This finding was considered by the court below, which held that it was supported by substantial and sufficient evidence. Thus the conviction of contempt arising out of the petitioner's conduct upon her examination on the *voir dire* is supported a finding that her false answers to some of the questions in that examination obstructed justice.

The petitioner contends, in effect, that the charge against her alleged several separate acts of contempt and that upon the authority of *Gompers* v. *Buck's Stove & Range Co., supra,* and *Toledo Newspaper Co.* v. *United States, supra,* if the petitioner was not guilty of one of the contempts charged, the judgment of conviction must be reversed. But this contention proceeds from a misunderstanding of the nature of the charge. The petitioner was not charged with separate acts of contempt on different occasions so that it should be assumed that her punishment for contempt rested upon a determination that she was guilty of all the acts and that the trial court would have meted out a different punishment if she was not guilty of all the acts.

The criminal contempt in this case arose out of petitioner's conduct upon her *voir dire* examination. It is apparent from the petition upon which the rule to show cause was based that it did not charge separate acts of contempt. Petitioner's conduct which was alleged to constitute contempt occurred on a single occasion and clearly constituted but a single contempt. We believe, therefore, that the rule in the *Gompers case,* restated in the *Toledo Newspaper Co. case,* is inapplicable. In the *Gompers case* several defendants were charged with contempt in having made and published various speeches, editorials and publications at different times in violation of an injunction, 221 U. S. 423. The trial court made special findings as to several of the charges, found all of the defendants guilty as to some of the charges, some of the defendants guilty as to others, and the several defendants individually guilty as to others. Thus in that case the defendants were clearly charged with separate contempts. The sentence did not indicate how much of the punishment was imposed for disobedience in any particular instance. In these circumstances, this Court said (p. 440) that it could not—

> suppose that having found them guilty of these nine specific acts he [the trial judge] did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be re-

> versed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

In the *Toledo Newspaper Co. case* there were similar charges of separate contempts which were stated in separate counts dealing with publications made at different times. We submit that the rule laid down in the *Gompers* and *Toledo Newspaper Co. cases*, requiring reversal where a defendant has been convicted of several separate acts of contempt and a general sentence has been given, if the defendant is not guilty of one of the separate acts of contempt, has no application here. Even if the finding that the petitioner was guilty of concealing her employment with the Foshay Company should be disregarded for the reasons suggested by petitioner, we believe it to be clear that the contempt arising out of her false answers to other questions on the same occasion and the sentence therefor are unaffected.

The obstruction of justice which constituted the contempt was due to the fact that through petitioner's conduct her potential unsuitability as a member of the jury was concealed from the court. If she was biased and thus unable to decide the case upon the evidence and the law as stated by the trial court, she was unfit for service on the jury. Her previous employment by Foshay & Company did not add to her unfitness. It may have furnished

a reason for her bias and if disclosed would have laid a basis for further questioning and, perhaps, for challenge. While concealment of that fact alone might have constituted contempt, the obstruction of justice remains the same if it be left out of account. When petitioner, by false answer that she was free of bias, induced the court to accept her as a juror, her presence on the jury insuring that there never could be a verdict of guilty, no matter what the evidence of defendants' guilt, there was a complete obstruction of justice. All further proceedings in the case were rendered nugatory.

We submit that there is no basis for an assumption that the trial court, in passing sentence, imposed some unidentified part for each false answer in the course of a single examination. The affront to the administration of justice, the defeat of the purpose of having any trial of the defendants in the Foshay case, was complete when the petitioner concealed the fact that she could not render a verdict according to the law and the evidence in that case. Thus, while we believe that the trial court properly found that petitioner had wilfully concealed her previous employment with Foshay & Co., and in doing so obstructed justice, and also that she had testified falsely as to her freedom from bias, the judgment of conviction should not be reversed merely if, for any reason, the finding as to her concealment of previous employment is disregarded.

III, IV

DEFENDANT'S CONDUCT CONSTITUTED CONTEMPT

Defendant contends that her concealment of her previous employment with the Foshay Company and her other conduct could not be considered a contempt of court in the absence of acts that "interfere with the order and decorum in the court room." (Br. p. 21.) It is settled, however, that acts tending to obstruct the performance by the court of its judicial duty, whether or not they involve any physical affront to the court or immediate disruption of its proceedings, may constitute contempt. Although contempt is perhaps usually some positive interference with the court, the power to punish for contempt has been extended both in this country and in England to new types of cases as they arise, the inquiry in each instance being merely whether there has been a tendency to interfere with the administration of justice. See *Ex Parte Hudgings,* 249 U. S. 378, 383; *Sinclair* v. *United States,* 279 U. S. 749, *supra;* Oswald, *Contempt of Court,* pp. 5, 6; *Helmore* v. *Smith,* 35 Ch. Div. 449; *In re Johnson,* 20 Q. B. D. 68, 74; 1 Bailey, *Habeas Corpus,* Sec. 63.

This Court has held that abuse of a court by deception is obstructive of the administration of justice and is a punishable contempt. Thus, in cases where the parties by collusion or concealment have presented a case for the opinion of a court, there being no actual controversy, this Court has said that "the whole proceeding was in contempt of

court." *Lord* v. *Veazie*, 8 How. 250, 255; *Cleveland* v. *Chamberlain*, 1 Black 419, 426.

The same view has been expressed in many cases in the Federal courts where witnesses have concealed material facts or have falsified their testimony. In these cases it has been deemed unnecessary to demonstrate actual perjury. The basis of the charge is that the court has been imposed upon and hampered in the conduct of its affairs. In *United States* v. *Dachis*, 36 F. (2d) 601 (S. D. N. Y.), a witness before the grand jury falsely stated that he was unable to produce certain papers in compliance with a *subpœna duces tecum*. His conduct was held to be a contempt of the court with which the grand jury was connected.

In *United States* v. *Karns*, 27 F. (2d) 453, 33 F. (2d) 489 (C. C. A. 8th), certiorari denied, 280 U. S. 592, one of the defendants offered in evidence a false instrument of lease. This action was held contemptuous, not because it constituted perjury or because of any interference with order in the court room, but because its inherent effect was to impede the administration of justice. In *Bowles* v. *United States*, 44 F. (2d) 115, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648, Bowles was held quilty of contempt. The facts were that though he has been disbarred as an attorney he represented himself to the court as a practicing attorney in good standing in another jurisdiction and thus obtained permission to represent a prisoner at the bar. His misrepresentation

was not immediately apparent nor in any way was it productive of disorderly consequences, but it was clearly an imposition upon the court and an interference with its judicial functions. In *Ex parte Steiner*, 202 Fed. 419 (C. C. A. 2d), it was held that the District Court had the power to punish as contempt a conspiracy to mislead the court by swearing to false affidavits in opposition to a motion for preliminary injunction; the attempted deception of the court was regarded as misbehavior obstructing justice.

Administration of the bankruptcy laws has been productive of numerous examples of contemptuous conduct on the part of witnesses disinclined to testify candidly. In *In re Michaels*, 194 Fed. 552 (E. D. N. Y.), a witness who was not the bankrupt was held guilty of contempt for giving false testimony. Investigation showed no ground for prosecution for perjury. But the witness' "conduct was contemptuous, in that he avoided telling the whole truth, that he professed ignorance as to matters as to which he must have had knowledge, and that he showed disregard for and brought disrespect upon the court proceedings by not playing the part of an honest man and a truthful witness."

Similarly, mere submission to examination has been held not to be a sufficient regard for the demands of an orderly administration of justice, where the witness has displayed a disposition to evade frank answers and to withhold the truth. See

Haimsohn v. *United States*, 2 F. (2d) 441 (C. C. A. 6th); *In re Bronstein*, 182 Fed. 349 (S. D. N. Y.); *In re Fellerman*, 149 Fed. 244 (S. D. N. Y.); *In re Gitkin*, 164 Fed. 71 (E. D. Pa.); *In re Schulman*, 177 Fed. 191 (C. C. A. 2d). See also *Loubriel* v. *United States*, 9 F. (2d) 807 (C. C. A. 2d); *O'Connell* v. *United States*, 40 F. (2d) 201, 204 (C. C. A. 2d), certiorari granted, 281 U. S. 716, dismissed pursuant to stipulation; *Lang* v. *United States*, 55 F. (2d) 922 (C. C. A. 2d), certiorari dismissed as improvidently granted, 286 U. S. 523, *supra*.

Similar results are reached by a number of State courts in circumstances that disclose interference with the administration of justice by falsification of facts or by failure to disclose information which should have been presented. In *Gibson* v. *Tilton*, 1 Bland 352 (Md.), the court said that a party who used in a proceeding within its jurisdiction a false affidavit made by another person outside the State but which he knew to be false, was punishable for practicing an imposition on the court. In *Welch* v. *Barber*, 52 Conn. 147, 155–156, and *State* v. *Moody*, 47 S. D. 111, the defendants had procured postponement or continuance of trial on the basis of misleading representations to the court. In both instances the conduct was held contemptuous because in obstruction of justice. In *Nunns* v. *County Court*, 188 App. Div. 424, Nunns had been drawn as a petit juror. He was asked if he knew the defendants or their reputation and answered that he

did not, whereupon he was accepted to serve as a juror on the trial. After the case was submitted he informed his fellow jurors that he knew the defendants. He was held guilty of contempt.

Under these authorities we believe it to be clear that a prospective juror who wilfully and knowingly conceals information which may have a material bearing upon his eligibility for jury service, is guilty of contempt. Both courts below have concluded that the concealment of the defendant's employment was wilful and obstructed the performance of the judicial functions of the trial court. The defendant contends that such a rule imposes a duty to speak upon jurors which is not imposed upon witnesses and therefore that concealment of material information by jurors can not amount to contempt. But we believe there is little or no analogy. It is assumed that the truth will be elicited from witnesses through the orderly process of examination by opposing counsel and we believe that the fact that witnesses may not volunteer unresponsive information furnishes no standard for the duty of a prospective juror. In a *voir dire* examination conducted by the court, the facilities of counsel who have studied and prepared the case are not involved.

The selection of a qualified jury by the trial judge is not a game of wits in which jurors may stand upon strictly responsive answers where they know that information in their possession may

have a material bearing on their fitness, and the questions asked or other circumstances call for frank disclosure when the witness is aware, as petitioner was, of disqualifying bias. Cf. *Pearcy* v. *Michigan Mutual Life Ins. Co.*, 111 Ind. 59. Deliberate concealment of bias by a prospective juror is necessarily contumacious, obstructive, and contemptuous. The rule for which we contend imposes no serious burdens upon jurors which their place in the process of administering justice does not demand. If a prospective juror fails to volunteer information through fault of memory or innocent ignorance, it may be assumed that his conduct would not ordinarily be contemptuous. Such a situation is not involved here, where both courts, after a review of the evidence, have concluded that the concealment was wilful and that the defendant knew of the material bearing of the information which she withheld.

Similarly, we believe that under the authorities cited the defendant's false answers to questions designed to disclose whether she was free of bias constituted a contempt, however respectfully the false answers may have been given. The defendant's conduct caused an extended trial to go for naught. The fact that her manner was not openly insulting is immaterial. Her conduct evidenced gross lack of respect for the serious purpose of the court and a determination to impose upon it in such a way that from the moment the defendant was accepted

for the jury there was a complete obstruction of the court in the performance of its proper functions. Within the settled principle that a tribunal must be able to protect itself from wilful obstructions of justice, defendant was guilty of contempt of court.

V

THE FINDINGS MADE BY THE DISTRICT COURT SHOULD NOT BE DISTURBED

The next contention urged by the defendant is that the finding of the District Court that the defendant answered falsely the questions ~~representing~~ respecting her freedom from bias and that these false answers obstructed the administration of justice can not be sustained because it was not established by the evidence beyond a reasonable doubt. The District Court recognized and correctly applied the rule that the burden was upon the Government to prove the defendant's guilt beyond a reasonable doubt. (R. 103.) But in an appellate court it is settled that the findings of fact made by the trial court in a contempt case are conclusive. It is not within its province to weigh the evidence. *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 338, *supra*; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 420, *supra*. See also *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 441, *supra*. The only inquiry permitted, it was said in the *Toledo Newspaper Co. case*, is "whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact" which are based upon them.

The evidentiary facts contained in the finding of the District Court are set forth at R. 99–102. (See also pp. 10–14, *supra.*) That these findings support the court's ultimate conclusion of fact that the defendant answered falsely that she was free from bias and that such answers obstructed the court in the performance of its duty, seems apparent. As the trial court said (R. 106):

> Her [the defendant's] studied attempt * * * to get on the jury, her evasive and incomplete answers, coupled with her conduct after she was accepted, convince us that her mind was prejudiced by some person, or for some reason, before she took her oath as a juror.

It is evident, therefore, that in reaching its conclusion the court did not rely solely upon what transpired after the defendant had been accepted as a juror but considered as well the evidence bearing upon her failure to disclose her employment by the Foshay Company.

All of these findings are supported by substantial evidence. In fact, many of them are almost verbatim copies of the testimony upon which they are based. The testimony bearing upon her employment with the Foshay Company is quoted at length in the opinion of the court below (R. 129–131), and it would seem unnecessary to repeat it here. While similar quotations from the testimony do not appear in that opinion with reference to her statements and actions before and after the jury

retired, the findings of the District Court with respect thereto (R. 101–102; see also pp. 12–14, *supra*) are so nearly like the testimony of the witnesses that a repetition of the testimony would practically amount to a duplication of those findings. It is evident from the findings and testimony that the District Court gave little credence to the denials and attempted explanations by the defendant of the facts disclosed by the very damaging testimony against her, but that court had the witnesses before it and was obviously in a better position to judge as to the demeanor and apparent sincerity of the witnesses than anyone not so situated.

VI

THE RULE AS TO THE QUALITY OF PROOF IN PERJURY CASES IS NOT APPLICABLE

Petitioner contends that her conviction cannot be sustained because, although she was charged with perjury, the Government relied wholly upon circumstantial evidence, despite the rule in perjury cases that the crime must be proved by the sworn and direct testimony of two living witnesses, or of one witness and by corroborating circumstances. (Br. pp. 28–30; S. Br. 8–10.) Apparently this contention relates only to the defendant's answers to questions relating to her bias. It does not appear to have been presented to the trial court by proper motion or otherwise. It was not specifically dealt with in the assignments of error in the court below nor was it expressly passed on by that

court. Accordingly, we submit that the question should not now be considered.

The contention is without merit, for as we have heretofore pointed out (*supra*, pp. 25–29), the gist of the offense with which the defendant was charged was not perjury but criminal contempt based on the deliberate obstruction of the administration of justice. Whether the false swearing amounted to perjury or not was immaterial. While the Government was required to prove the offense beyond a reasonable doubt (*Gompers* v. *Buck's Stove & Range Co., supra*), it clearly was not held to any particular type of proof. The traditional limitation upon the mode of proof of perjury seems to have no proper place in such a proceeding. Vindication of the dignity of the court and its protection against the wilful obstruction of its process is not hedged about with formal rules which have no logical relation to that purpose.

VII

THE TESTIMONY OF DEFENDANT'S FELLOW JURORS CONCERNING HER ACTIONS AND UTTERANCES IN THE JURY ROOM AFTER THE CASE HAD BEEN SUBMITTED TO THE JURY WAS PROPERLY RECEIVED IN EVIDENCE

It is contended by the defendant that the trial court erred in receiving in evidence the testimony of the defendant's fellow jurors concerning her actions and utterances in the jury room after the case had been submitted to the jury. (Br. pp. 31–36.) This testimony was introduced for the pur-

pose of showing the wilful purpose of the defendant in testifying on her *voir dire* examination that she was free from bias or prejudice, in order to be accepted as a juror, biased against the prosecution.

So far as we can ascertain, there is only one case directly in point upon this question, and this decision is in favor of the admissibility of the testimony. In *People ex rel. Nunns* v. *County Court,* 188 App. Div. (N. Y.) 424, it appears that the relator was drawn as a petit juror in the trial of an indictment for keeping a disorderly house. The prosecuting attorney, in examining the jury panel, informed them that the prosecution sought an indifferent jury of whom none was acquainted with the defendants or their establishment. None of them answered that they had knowledge of defendants or their place of business. Thereupon, in response to specific questions put to him, the relator answered that he did not know the defendants or either of them, and that he knew nothing of their place. Thereafter the relator was sworn, sat throughout the trial and took part in the verdict, by which the defendants were acquitted. After the case had been submitted to the jury and they had been sent to the jury room, the relator there stated to his fellows, or some of them, that he knew the defendants and their place, that he had visited it several times, and that in his opinion it was all right and a correct place. The trial court found that the answers which the juror had made

to the prosecuting attorney were false, that the conduct of the relator in the court room and in the jury room was deliberate, and that his behavior constituted criminal contempt of court. On appeal, one of the questions raised was whether the relator's fellow jurors were competent to testify to his statements in the jury room. In a thoroughly considered and well reasoned opinion the appellate court held (two judges dissenting) that the testimony of the defendant's fellow jurors was properly received (see particularly pp. 427–428, 430–431, 433, 434–435).

This decision finds support in a dictum of this Court in *McDonald* v. *Pless*, 238 U. S. 264, 269. There the question involved was whether a juror was competent to testify that he and his colleagues had been guilty of misconduct in reaching their verdict. This Court, after reviewing the authorities, stated that while the general rule was that a losing party can not, in order to secure a new trial, use the testimony of jurors to impeach their verdict, "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" It ruled, however, that the case before it was not of that character. It then proceeded to say that (p. 269):

> The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is with-

out foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

In the instant case the testimony is not being used to impeach a verdict but is being used in a contempt proceeding to punish a wrongdoer. We therefore submit that the testimony was clearly admissible.

The decisions cited by the defendant are clearly not in point. She relies principally upon *Matter of Cochran,* 237 N. Y. 336, which she asserts has repudiated the decision in the *Nunns case.* We do not think it has any such effect. The facts in that case were as follows: One Plant was on trial for criminally receiving stolen property. Cochran was called as a juror, examined, and accepted by the District Attorney, heard the evidence, and thereafter, having been sent to the jury room, deliberated with his fellow jurors as to the verdict. The result was a disagreement and the jury was discharged. Contempt proceedings followed.

The charges against Cochran were of two classes: (1) Alleged untrue statements made by him on his examination as to his qualifications as a juror, in that he falsely stated that he had no bias or prejudice that would affect his decision and that he knew of no reason why he could not fairly try the case; (2) improper conduct in the jury room during the deliberations of the jury, intended to affect the result—in that he stated facts to be in

evidence as to which no testimony had been given; that he made a proposition to the jurors that they should acquit if one Smith, a stranger to the proceeding, would give a bond for Plant's future good behavior, and that he failed to keep his promise to render a decision on the evidence, to be a fair and impartial juror and to obey the instructions of the court, because believing the defendant to be guilty he still refused to vote for his conviction. As to the charges of the first character, which were the only ones similar to those involved in the instant case, the court said (p. 338):

> we do not decide that if he falsely answered the questions of the district attorney whether under oath or not under oath he would be guilty of criminal contempt of court. (*People ex rel. Nunns* v. *County Court, Nassau Co.*, 188 App. Div. 424.) *We fail to find, however, any evidence whatever from which an inference can be drawn that his answers in this respect were untrue at the time they were made.* * * * (Italics ours.)

It then held that the second class of offenses charged did not afford a basis for a conviction of criminal contempt on the ground that (pp. 340–341)—

> no juror may be punished for contempt for his part in any proceedings connected with the rendition of the verdict, because of discussions had, arguments used, statements made, for the reasons given by him for his vote or for the vote itself.

In the instant case no attempt is being made to punish the juror for anything said or done in connection with the rendition of the verdict. The testimony in question was used merely to show the juror's state of mind and motives when examined upon the *voir dire*. The court in *Matter of Cochran*, 237 N. Y. 336, *supra*, appears to recognize that in certain cases the juror's testimony is not inadmissible, for it says (p. 340):

> Nor probably may any juror called as a witness, in a proper proceeding assert that he is privileged from giving testimony as to occurrences in the jury room. * * *

The defendant also relies upon certain general statements in *Woodward* v. *Leavitt*, 107 Mass. 453, a case which involved the admissibility of testimony of jurymen in support of a verdict on a motion for a new trial. That case, as well as *Hewitt* v. *Chapman*, 49 Mich. 4, also cited by the defendant, in which the testimony of jurors in one case was attempted to be used in another to show one of the elements of their verdict in the first case, are obviously not in point.

The court below held that even if the testimony of the defendant's fellow jurors as to her statements and conduct in the jury room were disregarded, there was sufficient other evidence to sustain the conviction. (R. 142–144.) After discussing numerous authorities, including the decision of this Court in *Sinclair* v. *United States*, 279 U. S. 749, 767, *supra*, the court held that even if the evidence

was incompetent it should be assumed that since the case was tried to the court without a jury, the judgment was based only upon the competent evidence (which was ample to support it) and, therefore, that errors in the admission of evidence should be disregarded and the judgment should be affirmed.

VIII

DEFENDANT'S DENIALS DID NOT PURGE HER CONTEMPT

Defendant urges in her supplemental brief (S. Br. p. 5) that her contempt, if any, was purged by the denials in her sworn answer to the petition and by her subsequent testimony at the trial. She stated that at the time of her examination by the trial judge she did not have in mind her employment at the Foshay Company, and that her answers to the questions on the subject of bias were true. This ancient defense of compurgation was not raised by any appropriate action during the proceedings before the District Court, nor presented by assignment of error to the Circuit Court of Appeals. The point was discussed in the opinion of the latter court (R. 136–137), but was not presented in the petition to this Court for a writ of certiorari. Under these circumstances we believe it is not now properly before this Court for consideration. *Burns* v. *United States,* 274 U. S. 328, 336; *Fleischmann Co.* v. *United States,* 270 U. S. 349, 356; *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 375; *Gonzales* v. *Buist,* 224 U. S. 126, 130.

Even if the question may be considered, we believe it to be without merit. Whatever may have been the source of the anachronism of compurgation, which as Blackstone said was more favorable to the defendant's liberty than the process of civil contempt in equity, though perhaps no less dangerous to his conscience, such doctrines can not now prevail, even in proceedings of criminal contempt. *Ex parte Savin,* 131 U. S. 267, 278, *supra; United States* v. *Shipp,* 203 U. S. 563, 574, *supra;* 214 U. S. 386; *Swepston* v. *United States,* 251 Fed. 205; *In re Oriel,* 17 F. (2d) 800, 803, 23 F. (2d) 409 (C. C. A. 2d), aff'd, 278 U. S. 358; *Bowles* v. *Laws,* 45 F. (2d) 669 (App. D. C.), certiorari denied, 283 U. S. 841; *In re LaVarre,* 48 F. (2d) 216 (S. D. Ga.); 41 *Harvard Law Review* 51.[6]

In the *Savin case, supra,* the process was expressly denied, and in *United States* v. *Shipp, supra,* this Court said (203 U. S. 574):

> On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law,

[6] Recent decisions of various State courts are to the same effect. *Carson* v. *Ennis,* 146 Ga. 726; *Dale* v. *State,* 198 Ind. 110; *State* v. *District Court,* 10 Pac. (2d) 586 (Mont.); *In re Singer,* 105 N. J. Eq. 220; *State* v. *Keller,* 8 Pac. (2d) 786 (N. M.); *Boorde* v. *Commonwealth,* 134 Va. 625; *Herring* v. *Houston Nat. Exch. Bank,* 113 Texas 337. See also *Huntington* v. *McMahon,* 48 Conn. 174; *Bate's Case,* 55 N. H. 325; *Matter of Snyder,* 103 N. Y. 178; *State* v. *Harpers Ferry Bridge Co.,* 16 W. Va. 864; note, 9 L. R. A. (N. S.), 1120. Cf. *People* v. *Severinghaus,* 313 Ill. 456; *People* v. *Burr,* 316 Ill. 166.

> as is suggested by the propounding of interrogatories and the very phrase, purgation by oath (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent.

When the *Shipp case* came to this Court a second time reference was made to the prior decision, which was said to be (214 U. S. 405):

> * * * that the answers of the defendants, under oath, disavowing intent did not purge them.

In *Bowles* v. *United States,* 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648, it was said (p. 852):

> Little need be said as to the position of respondent that the contempt was purged by the answer. It is well settled in the federal courts that, with the possible exception of cases where the contempt inheres in the intent with which an ambiguous act is done, a person may not purge himself of the contempt charged by mere denial under oath.

The process of compurgation in defense to a charge of criminal contempt has had no existence in England since 1796 (*Matter of Crossley,* 6 Term Reports 701 [1796]), although not long before that Blackstone, while severely criticizing the process, felt constrained to say that by long and immemorial usage it had become the law of England. (4 *Blackstone,* 288.) While in rare instances the defense has been recognized in some of the inferior Federal courts (see *United States* v. *Dodge,* Fed. Cas. No. 14,975; *In re May,* 1 Fed. 737), there have been no such instances since the decision in the *Shipp case,* and the authorities cited *supra* disclose that whenever the defense has been made since that time in the Federal courts it has been overruled.

We submit that the remnant of this mediaeval anachronism, surviving, if at all, under a precautionary expression in the opinion of this Court in the *Shipp case,* has no place in the practice of the Federal courts. The process was denied in the *Savin case,* and repudiated in the *Shipp case.* If there is anything left of it, it should no longer be permitted to survive in the truncated form in which those decisions have left it. If applicable at all, it would seem to be applicable to all cases of criminal contempt, as it was at common law. (4 *Blackstone* 288.) But this is denied by the decisions of this Court.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1932.

Genevieve A. Clark, *vs.* United States of America.	On Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

[March 13, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, Genevieve A. Clark, has been adjudged guilty of a criminal contempt in that with intent to obstruct justice she gave answers knowingly misleading and others knowingly false in response to questions affecting her qualifications as a juror. 1 F. Supp. 747.

The conviction by the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit, the proceeding being remanded, however, to correct an error in the sentence. 61 F. (2d) 695. A writ of certiorari brings the case here.

In September, 1931, there came on for trial in the United States District Court for the District of Minnesota an indictment which had been returned against William B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud. The petitioner was one of the panel of jurors summoned to attend. She did not know when the summons came to her for what case she had been called, and telephoned a sister, Mrs. Brown, that she would like to be excused. She was advised by her sister, who had made inquiry of the Clerk of the Court, that excuses, if there were any, would have to be presented to the judge. At the same time she was informed that the trial for which she had been summoned was the Foshay trial, and that she would probably not be accepted as a juror since she had been employed by the Foshay Company, a corporation with which the indicted men had been connected as officers.

On the day appointed for the trial the petitioner, in company with her husband, reported at the court room. The District Judge

examined the members of the panel as to their qualifications for service. While the examination was going on, the petitioner stated to several women on the panel that she wished to serve on the jury, that for this she had a special reason, and that she was afraid her former employment by the Foshay Company would disqualify her; that she had worked for the company as a stenographer and typist for about two weeks in the summer of 1929, but did not know or come in contact with any of the defendants personally.

Her service as stenographer and typist was not the only tie of friendliness that linked her to the Foshay firm. There were other contacts or relations that are not without significance, though less direct and personal. Until her marriage in 1922, she had been employed with the title of assistant cashier in a bank at St. Paul, of which Mr. Clark was then the president. Foshay in those years was a customer of the bank as depositor and borrower. Mr. Clark resigned as president in 1925, but his business relations with Foshay continued in the years that followed. Letters that passed between them are printed in the record. The tone is cordial and almost intimate. True, there is nothing to show that the friendly relations had spread to the petitioner. She denies that she had any acquaintance with Foshay or his associates, and the District Court by its findings has accepted her denial. It is next to impossible, however, that her husband, who was with her in the court room, had refrained from telling her of his own friendship for one of the prisoners at the bar.

The petitioner, upon being called to the jury box, was questioned under oath by the judge presiding at the trial. She was asked whether she had ever been in any business of any kind. She answered, "I have been a stenographer before my marriage, yes." She was asked in what kind of business she had worked. She answered, "Well, I did some banking and some real estate and insurance, and I was with an automobile concern, with a Nash agency." Finally she was asked whether she felt that her mind was free from bias, and whether if accepted as a juror she would be able and willing to base her verdict on the evidence and the law as given to her by the court. To those inquiries she answered that her mind was clear of bias, and that the law and the evidence would govern her in arriving at a verdict.

The petitioner after thus testifying became a member of the jury, which was thereupon complete. The trial which followed lasted eight weeks. Two officers, a man and a woman, were in charge of the jury from the beginning to the end. During the first week of the trial, the petitioner made the remark to several of her fellow jurors that she regarded Mr. Foshay as a victim of circumstances, that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, had come back without a dollar. When asked by a juror where she had procured that information, which was not supported by the evidence, she said that it was from a newspaper which she had read before the trial. Later on she gave expression to dissatisfaction with the Government because of the way the soldiers were treated after the war.

During the deliberations of the jury, after the case was finally submitted, she announced that since the prosecuting attorney had been unable to convince her of the guilt of the accused, the other jurors could hardly be expected to do so. At times she placed her hands over her ears when other jurors tried to reason with her, and argument became useless because she was unwilling to reply. She said of a witness for the Government that he had given perjured evidence in the south in an attempt to convict an innocent man. This information had come to her in the course of a conversation with her husband who had seen her at her hotel, in the presence of a bailiff, while the trial was under way. After being kept together for a week, the jury was discharged because unable to agree. The votes of eleven were for conviction. The single vote for acquittal was cast by the petitioner.

On November 4, 1931, the Government filed an information in support of a rule to show cause why the petitioner should not be punished for a criminal contempt. The information charges that her answers upon the *voir dire* examination were wilfully and corruptly false, and that the effect of her misconduct had been to hinder and obstruct the trial. In response to the rule to show cause the defendant filed an answer denying the misconduct, and alleging that her vote for acquittal had been dictated by her conscience. There was a full and patient hearing by a District Court of two judges. The court found the facts as they have been stated in this opinion. It drew from them the conclusion that the juror

had obstructed the administration of justice, when examined on her *voir dire,* by "deliberately and intentionally" concealing the fact that she had been employed during the summer of 1929 by the Foshay Company. It drew the conclusion also that she had obstructed the administration of justice by stating falsely that she was free from bias and that her verdict would be based only upon the evidence as introduced and the law as given by the court. For the contempt thus adjudged there was a sentence of imprisonment and fine.

1. Concealment or misstatement by a juror upon a *voir dire* examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice.

There was concealment by the petitioner, and that wilful and deliberate. She had been asked to state the kinds of work that she had been doing in other years. She counted off a few, and checked herself at the very point where the count, if completed, would be likely to bar her from the box. There is no room for the excuse of oversight or negligence. She had been warned that disclosure would lead to challenge and rejection. With her mind full of the warning she told the part truth that was useless, and held back the other part that had significance and value. Whether this was perjury or false swearing, there is no occasion to inquire. It was a deliberate endeavor to thwart the process of inquiry, and to turn a trial into a futile form.

Added to concealment there was positive misstatement. The petitioner stated to the court that her mind was free from bias. The evidence is persuasive that it was hostile to the Government. Bias is to be gathered from the disingenuous concealment which kept her in the box. She was intruding into a relation for which she believed herself ineligible, and intruding with a motive. The only plausible explanation is a preconceived endeavor to uphold the cause of the defendants and save them from their doom. Bias, thus revealed at the beginning, is confirmed by everything that followed. While the trial was still in progress, she argued with her fellow jurors that Foshay was a hapless victim of circumstances too strong for him, and went outside the evidence, quoting statements in a newspaper to win them to her view. After the trial was over and deliberations had begun, she waved aside all argument and closed her ears to the debate. She had closed her mind to it before.

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." White, C. J., in *Ex parte Hudgings*, 249 U. S. 378, 383. The petitioner is not condemned for concealment, though concealment has been proved. She is not condemned for false swearing though false swearing has been proved. She is condemned for that she made use of false swearing and concealment as the means whereby to accomplish her acceptance as a juror, and under cover of that relation to obstruct the course of justice. There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a juror becomes a part or member of the court. *In re Savin*, 131 U. S. 267; *United States* v. *Dachis*, 36 F. (2d) 601. The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.

The books propound the question whether perjury is contempt, and answer it with nice distinctions. Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely. *Ex parte Hudgings*, *supra*. For offenses of that order the remedy by indictment is appropriate and adequate. On the other hand, obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury. Cf. *In re Ulmer*, 208 Fed. 461; *United States* v. *Appel*, 211 Fed. 495; *United States* v. *Karns*, 27 F. (2d) 453; *United States* v. *Dachis*, 36 F. (2d) 601; *Lang* v. *United States*, 55 F. (2d) 922; 286 U. S. 523; *United States* v. *McGovern*, 60 F. (2d) 880. We must give heed to all the circumstances, and of these not the least important is the relation to the court of the one charged as a contemnor. Deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office (*Bowles* v. *United States*,

50 F. (2d) 848, 851; *United States* v. *Ford*, 9 F. (2d) 990), and that apart from its punishable quality if it had been the act of some one else. A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints. The petitioner blurs the picture when she splits her misconduct into parts, as if each were a separate wrong to be separately punished. What is punished is misconceived unless conceived of as a unit, the abuse of an official relation by concealment and deceit. Some of her acts or none of them may be punishable as crimes. The result is all one as to her responsibility here and now. She has trifled with the court of which she was a part, and made its processes a mockery. This is contempt, whatever it may be besides. *Sinclair* v. *United States*, 279 U. S. 749; *In re Savin*, 131 U. S. 267.

2. The admission of testimony as to the conduct of the petitioner during the deliberations of the jury was not a denial or impairment of any lawful privilege.

The books suggest a doctrine that the arguments and votes of jurors, the *media concludendi*, are secrets, protected from disclosure unless the privilege is waived. What is said upon the subject in the adjudicated cases, is dictum rather than decision. See *Woodward* v. *Leavitt*, 107 Mass. 453, 460; cf. *Matter of Cochran*, 237 N. Y. 336, 340; *People ex rel. Nunns* v. *County Court*, 188 App. Div. (N. Y.) 424, 430. Even so, the dicta are significant because they bear with them the implications of an immemorial tradition. The doctrine is developed, and the privilege broadly stated, in the writings of a learned author. Wigmore, Evidence, (2nd ed.) vol. 5, sec. 2346. It has recognition to some extent by other authors of repute (Hughes, Evidence, p. 301; Jones, Commentaries on Evidence, 2nd ed., sec. 2212; Chamberlayne, Evidence, vol. 5, sec. 3707), but in a way that has confused it with something very different, the competency of witnesses to testify in impeachment of a verdict. What concerns us at the moment is the privilege alone. There will be need to recur later to the rule as to impeachment. For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations

is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision.

Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand. The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in.* Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has

*As to the function of the judge in the decision of such preliminary questions see: Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harvard Law Review 392, 397, 403; Morgan, Functions of Judge and Jury, 43 Harvard Law Review 165; Maguire and Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale Law Journal 1101, and the cases there collected.

been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind. *People ex rel. Nunns* v. *County Court, supra.*

We turn to the precedents in the search for an analogy, and the search is not in vain. There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. See, e. g., *Reynell* v. *Sprye,* 10 Beav. 51, 54, 11 Beav. 618; *In re Postlewaite,* 35 Ch. D. 722, 724; cf. *Regina* v. *Bollivant,* [1900] 2 Q. B. D. 163, [1901] A. C. 196. But this conception of the privilege is without support in later rulings. "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." *O'Rourke* v. *Darbishire,* [1920] A. C. 581, 604. To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie* evidence that it has some foundation in fact." *O'Rourke* v. *Darbishire, loc. cit., supra;* also pp. 614, 622, 631, 633. When that evidence is supplied, the seal of secrecy is broken. See also: *Regina* v. *Cox,* [1884] 14 Q. B. D. 153, 157, 161, 175; *cf. Bujac* v. *Wilson,* 27 N. Mex. 112; *In re Niday,* 15 Idaho 559. The judgment of the House of Lords in *O'Rourke* v. *Darbishire* has given to the whole subject a definitive exposition. Nor does the loss of the privilege depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. The attorney may be innocent, and still the guilty client must let the truth come out. *Regina* v. *Cox, supra; Matthews* v. *Hoagland,* 48 N. J. Eq. 455, 469; *State* v. *Faulkner,* 175 Mo. 543, 593; *Standard Fire Ins. Co.* v. *Smithhard,* 183 Ky. 679, 684; *State* v. *Kidd,* 89 Ia. 54; *cf. Bank of Utica* v. *Mersereau,* 3 Barb. Ch. 528, 598; *Coveney* v. *Tannahill,* 1 Hill (N. Y.) 33, 41.

With the aid of this analogy, we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there

sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption. *Cf. Attorney-General* v. *Pelletier*, 240 Mass. 264; *People ex rel. Hirschberg* v. *Board of Supervisors*, 251 N. Y. 156, 170; *State* v. *Campbell*, 73 Kansas 688.

Nothing in our decision impairs the authority of *Bushell's* case, Vaughan 135, 1670, with its historic vindication of the privilege of jurors to return a verdict freely according to their conscience. There had been a trial of Penn and Mead on a charge of taking part in an unlawful assembly. The jurors found a verdict of acquittal, though in so doing they refused to follow the instructions of the court. For this they were fined and imprisoned, but were discharged on *habeas corpus*, Vaughan, C. J. pronouncing "that memorable opinion which soon ended the fining of jurors for their verdicts, and vindicated their character as judges of fact." Thayer, Preliminary Treatise on Evidence at the Common Law, p. 167. *Bushell's* case was born of the fear of the Star Chamber and of the tyranny of the Stuarts. Plucknett, Concise History of the Common Law, p. 114. It stands for a great principle, which is not to be whittled down or sacrificed. On the other hand, it is not to be strained and distorted into fanciful extensions. There is a peril of corruption in these days which is surely no less than the peril of coercion. The true significance of *Bushell's* case is brought out with clearness in declaratory statutes. By one of these, a statute of New York, "No juror shall be questioned [for any verdict rendered by him], or be subject to any action, civil or criminal, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law." R. S. of N. Y., Part 3, c. 7,

Title 4, Sec. 69; Civil Rights Law, Sec. 14. The Revisers tell us in their notes that the statute, though new in form, is declaratory of an ancient principle (R. S., 2nd ed., vol. 3, p. 741), and so we may assume it is. *Matter of Cochran*, 237 N. Y. 336, 340; *cf. People ex rel. Nunns* v. *County Court, supra* at p. 448. It would give no help to the petitioner though it were enacted for the federal courts. She has not been held to answer for any verdict that she has rendered, nor for anything said or done in considering her verdict. *Matter of Cochran, supra.* She has been held to answer for the deceit whereby she made herself a juror, and was thereby placed in a position to vote upon the case at all. What was said and done in the jury room is not the gist of her wrongdoing. What was said and done in the jury room is no more than confirmatory evidence of her state of mind before. One could urge with as much reason that she would be subjected to coercion if she had been indicted and tried for bribery and the same evidence had been accepted in support of the indictment.

Nor is there anything in our decision at variance with the rule, which is not without exceptions (*Mattox* v. *United States*, 146 U. S. 140, 148; cf. Wigmore, Evidence, vol. 5, secs. 2353, 2354; *Woodward* v. *Levett*, 107 Mass. 453; *Hyman* v. *Eames*, 41 Fed. 676; *Fuller* v. *Fletcher*, 44 Fed. 34, 39), that the testimony of a juror is not admissible for the impeachment of his verdict. *McDonald* v. *Pless*, 238 U. S. 264. Here there was no verdict, and hence none to be impeached. But in truth the rule against impeachment is wholly unrelated to the problem now before us, the limits of the privilege to maintain a confidence inviolate. *Wigmore, supra*, sec. 2346. Impeachment may be forbidden though the jurors waive their privilege, and combine with the defeated litigant to make the verdict null. Privilege may be asserted though there is nothing to impeach.

In the record now before us the evidence of guilt is ample, without the happenings in the jury room, to break down the claim of privilege, and thus let in the light. There is the evidence of the concealment of the petitioner's employment with all its sinister implications. There is the evidence of her arguments with the jurors while the trial was going on. There is even the evidence of her vote, for the fact that she had voted for acquittal had been stated in her answer, and to the extent of the voluntary disclosure the privilege had been waived. Indeed what happened in the jury

room added so little to the case that the error, if there had been any, in permitting it to be proved, would have to be regarded as unsubstantial and without effect on the result. No one can read the findings of the triers of the facts and hesitate in concluding that even with this evidence omitted there would have been an adjudication of contempt. In considering with all this fulness the merits of the ruling, we have been moved by the desire to build securely for the future.

3. The oath of a contemnor is no longer a bar to a prosecution for contempt.

Little was left of that defense after the decision of this court in *United States* v. *Shipp*, 203 U. S. 563, 574. Since then there has has been no purgation by oath where an overt act of defiance is the gist of the offense. The point was reserved whether sworn disavowal would retain its ancient force "if the sole question were the intent of an ambiguous act."

The time has come, we think, to renounce the doctrine altogether and stamp out its dying embers. It has ceased to be a defense in England since 1796. *Matter of Crossley*, 6 Term Reports 701. It has been rejected generally in the states. *Dale* v. *State*, 198 Ind. 110; *State* v. *District Court*, 10 Pac. (2d) 586 (Mont.); *In re Singer*, 105 N. J. Eq. 220; *State* v. *Keller*, 8 Pac. (2d) 786 (N. Mex.); *Boorde* v. *Comm.*, 134 Va. 625; *Huntington* v. *McMahon*, 48 Conn. 174, 200, 201; *State* v. *Matthews*, 37 N. H. 450, 455; *Bate's Case*, 55 N. H. 325, 327; *State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873; cf. *Carson* v. *Ennis*, 146 Ga. 726; *Matter of Snyder*, 103 N. Y. 178, 181; note 9 L. R. A. (n. s.) 1119; Curtis, 41 Harvard Law Review 51, 65. It has even lost, since the decision in the *Shipp* case, the title to respect that comes of a long historical succession. It has taken its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial. Thayer, *op cit., supra*, p. 8, *et seq.*

4. There was no denial to the petitioner of a fair notice of hearing, nor any variance of substance between the information and the findings.

We have considered the arguments to the contrary, and find them without merit.

The judgment of the Circuit Court of Appeals is accordingly

Affirmed.